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No. OFFICE OF THE CLERK

Supreme Court of the United States

STOLT-NIELSEN S.A.,
STOLT-NIELSEN TRANSPORTATION GROUP LTD.,
AND RICHARD B. WINGFIELD,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

PETITION FOR A WRIT OF CERTIORARI

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JULY 20, 2006

QUESTION PRESENTED

Do the federal courts lack authority, under the Separation of Powers, to enjoin federal prosecutors from breaching a binding contractual obligation "not to bring any criminal prosecution" against a company and its executives?

PARTIES TO THE PROCEEDINGS BELOW

All the parties to the proceedings below are identified in the caption.

RULE 29.6 STATEMENT

Pursuant to Rule 29.6 of this Court's rules, Petitioner Stolt-Nielsen Transportation Group Ltd. states that all of its stock is owned by its parent corporation, Petitioner Stolt-Nielsen S.A., a publicly held corporation. Petitioner Stolt-Nielsen S.A. states that it does not have any parent corporation and that no publicly held company owns more than 10% of its stock.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners Stolt-Nielsen S.A., Stolt-Nielsen Transportation Group (collectively "Stolt-Nielsen"), and Richard B. Wingfield respectfully petition this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit.

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-21a), as amended (Pet. App. 22a-26a), is reported at 442 F.3d 177 (3d Cir. 2006). The opinion of the district court (together with findings of fact) (Pet. App. 34a-64a) is reported at 352 F. Supp. 2d 553 (E.D. Pa. 2005).

JURISDICTION

The judgment of the court of appeals was entered on March 23, 2006 and amended on May 16, 2006. A timely petition for rehearing *en banc* was denied on June 20, 2006. The jurisdiction of this Court is authorized by 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS

Article III, Section 1, of the United States Constitution provides in pertinent part: "The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish."

Article III, Section 2, Clause 1, of the United States Constitution provides in pertinent part: "The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority; . . . to Controversies to which the United States shall be a Party . . . ."

The Fifth Amendment to the United States Constitution provides in pertinent part: "No person shall be . . . deprived of life, liberty, or property, without due process of law . . . ."

STATEMENT OF THE CASE

This case raises an important constitutional question concerning the authority of federal courts to prevent prosecutors from breaching non-prosecution agreements. The Third Circuit held — in conflict with decisions in another circuit — that, under the Separation of Powers, the district court was powerless to enjoin an imminent federal prosecution in breach of a written Amnesty Agreement, even though the prosecutors had knowingly relinquished their prosecutorial discretion and even though the prosecution would violate the defendants' constitutional rights and cause irreparable injury. In reversing the district court's injunction and permitting an unlawful prosecution to proceed, the Third Circuit effectively abdicated judicial power vested in the federal courts by the United States Constitution.

1. The Antitrust Division's Amnesty Program

The U.S. Department of Justice Antitrust Division has adopted a Corporate Leniency Policy (Pet. App. 72a-75a), under which companies are enticed to voluntarily self-report price-fixing activity in exchange for the Division's promise of "*not charging* such a firm criminally for the activity being reported." Pet. App. 72a (emphasis added). Given the benefit accorded, the Division commonly refers to its policy as an "amnesty" or "immunity" policy. *See, e.g.*, Pet. App. 72a ("The policy also is known as the corporate amnesty or corporate immunity policy."); 98a (Speech by Antitrust Division Director of Criminal Enforcement Scott D. Hammond, Sept. 12, 2000) ("our Corporate Leniency Program, or as it is also known, the Corporate Amnesty Program"); 117a n.1 (Speech by Director Hammond, Nov. 21-22, 2000) ("[C]orporate amnesty and corporate leniency

are used interchangeably to mean *a complete pass from criminal prosecution* and zero dollars in fines for the anticompetitive conduct.") (emphasis added).

The Antitrust Division, in its public pronouncements, has since the inception of the Amnesty Program in 1993 emphasized that a company with amnesty would not be indicted or otherwise prosecuted. *See, e.g.*, Pet. App. 88a (Speech by Assistant Attorney General Anne K. Bingaman, Aug. 10, 1993) (announcing adoption of current Corporate Amnesty Policy and equating amnesty to "*not seeking indictment of corporations*") (emphasis added); 94a (Speech by Assistant Attorney General Bingaman, Oct. 21, 1993) (same); 85a (Antitrust Division Grand Jury Practice Manual, Ch. 5 (Immunity), Sec. J (Corporate "Amnesty"), stating that according amnesty to a corporation "means not indicting such a firm").

The Division in its public pronouncements also has expressly recognized that it purposefully relinquishes its prosecutorial discretion through the Amnesty Program:

> [F]or an Amnesty Program to work, an antitrust authority must do more than just publicize its policies and educate the public. It has to be willing to make the ultimate sacrifice for transparency — *the abdication of prosecutorial discretion.*
>
> Our Amnesty Program by its nature is transparent because we have eliminated, to a great extent, the exercise of prosecutorial discretion in its application.

Pet. App. 126a (emphasis added).

Under the Amnesty Program, amnesty is available only to the first conspirator to report the antitrust conspiracy. Pet. App. 73a. As the Antitrust Division puts it: "The catch is that it is only available to the first one in the door. If you are second, even if only by a matter of a few hours, which has

happened on a number of occasions, the second firm and all of its culpable executives will be subject to full prosecution. This 'winner-take-all' approach sets up a race . . . ." Pet. App. 135a-36a (Speech by Antitrust Division Director of Criminal Enforcement Scott D. Hammond, Mar. 8, 2001).

Over the past decade, the Division's Amnesty Program has been a resounding success, leading to the disclosure of numerous cartels and the criminal conviction of numerous corporations and executives. As the United States described in a recent *amicus curiae* brief to this Court, it is precisely because of the Antitrust Division's avowed promise not to prosecute that the Amnesty Program is so attractive to un-indicted companies and is by far the Antitrust Division's most effective tool in "cracking" anti-competitive cartels: *"The program has been responsible for cracking more international cartels than all of the Division's search warrants, secret audio or videotapes, and FBI interrogations combined.* Since 1997, cooperation from amnesty applications has resulted in scores of criminal convictions and more than $1.5 billion in criminal fines." Brief for the United States as *Amicus Curiae* Supporting Petitioners, *F. Hoffman-La Roche Ltd. v. Empagran, S.A.*, 542 U.S. 155 (2004), *available at* 2004 WL 234125, at *20 (emphasis added); *see also, e.g.*, Pet. App. 117a (Speech by Director Hammond, Nov. 21-22, 2000) ("[O]ver the last five years, the results have been staggering. There has been more than a ten-fold increase in amnesty applications . . . .").

2. The Amnesty Agreement Between The Antitrust Division And Stolt-Nielsen

Enticed by the promised benefits of amnesty, during late 2002 and early 2003 Stolt-Nielsen sought and received admission into the Antitrust Division's amnesty program. Stolt-Nielsen and the Antitrust Division entered into a letter

agreement dated January 15, 2003 (the "Amnesty Agreement") setting forth the terms and conditions of the company's amnesty. Pet. App. 65a-71a. The letter was signed by the Deputy Assistant Attorney General responsible for criminal prosecutions, and countersigned by counsel for Stolt-Nielsen and by the CEO of Stolt-Nielsen's transportation unit. Pet. App. 71a. The Amnesty Agreement is based on, and materially identical to, the Antitrust Division's model amnesty agreement. Pet. App. 76a-81a.

In the Amnesty Agreement, Stolt-Nielsen agreed to voluntarily incriminate itself and others in an antitrust conspiracy in the parcel-tanker shipping industry. Pet. App. 66a-67a. In return, the Antitrust Division agreed "*not to bring any criminal prosecution* against [Stolt-Nielsen] for any act or offense it may have committed prior to the date of this letter [January 15, 2003] in connection with the anticompetitive activity being reported." Pet. App. 68a (emphasis added). The Antitrust Division also agreed that cooperating directors, officers and employees of Stolt-Nielsen "*shall not be prosecuted criminally* by the Antitrust Division for any act or offense committed prior to the date of this letter [January 15, 2003] in connection with the anticompetitive activity being reported." Pet. App. 69a (emphasis added).

After entering into the Amnesty Agreement, Stolt-Nielsen's counsel promptly provided the Antitrust Division with "smoking gun" documents and other information establishing the existence of a hard-core customer-allocation conspiracy. Stolt-Nielsen's counsel obtained the crucial "smoking gun" documents — actual lists used by Stolt-Nielsen and its main competitor, Odfjell Seachem AS, to allocate customers — from Stolt-Nielsen executive Richard B. Wingfield, a petitioner here.

The Antitrust Division subsequently used the evidence obtained from Stolt-Nielsen and Wingfield to successfully

prosecute Stolt-Nielsen's co-conspirators. To date, two corporate co-conspirators have pleaded guilty and paid fines totaling $62 million, and top executives at these companies have also pleaded guilty, paid additional fines, and served time in federal prison.

3. The Antitrust Division's Attempt To Indict Stolt-Nielsen And Wingfield Notwithstanding The Amnesty Agreement

Despite Stolt-Nielsen's voluntary delivery of the evidence leading to these successful prosecutions, the Antitrust Division threatened to prosecute Stolt-Nielsen and at least one of its executives, Wingfield, for their part in the conspiracy Stolt-Nielsen reported. Pet. App. 64a (¶ 89). As the purported justification for its unilateral abrogation of the grant of amnesty under the Amnesty Agreement, the Division asserted that Stolt-Nielsen and Wingfield had breached certain representations or conditions under the Agreement. Pet. App. 42a-43a, 48a, 63a (¶ 80), 64a (¶¶ 87-89).

On June 24, 2003, Wingfield was arrested and charged pursuant to a complaint with participating in a customer allocation conspiracy between March 2001 and October 2002, a time period specifically covered by the Amnesty Agreement. Pet. App. 8a, 63a-64a (¶ 86). The conspiracy alleged is the very same conspiracy Stolt-Nielsen voluntarily reported to the Division, with Wingfield's critical assistance. While arrested and charged, Wingfield has not yet been indicted. Pet. App. 8a-9a n.1.

4. The District Court's Enforcement Of The Amnesty Agreement Through An Injunction Barring Indictments

Stolt-Nielsen commenced a civil action in the district court to enforce the Antitrust Division's obligations under the Amnesty Agreement through injunctive or declaratory relief.

Pet. App. 9a. Wingfield commenced his own similar action, and the two were consolidated. Pet. App. 9a. The Antitrust Division thereafter agreed to refrain from seeking an indictment until the district court resolved Stolt-Nielsen's claims. Pet. App. 9a.

The district court held a two-day hearing in which it heard testimony from two live witnesses (i.e., the Stolt-Nielsen and Antitrust Division counsel who negotiated and signed the Amnesty Agreement) and considered numerous exhibits and extensive argument. On January 14, 2005, the district court issued a memorandum opinion, detailed findings of fact, and a judgment in favor of Stolt-Nielsen and Wingfield. Pet. App. 34a-64a. Finding that Stolt-Nielsen and Wingfield had not breached the Amnesty Agreement, the district court enforced the Amnesty Agreement by enjoining the Division from indicting or otherwise prosecuting Stolt-Nielsen and Wingfield for their roles in the anticompetitive activity prior to January 15, 2003. Pet. App. 51a.

In its opinion, the district court expressly considered the appropriateness of ruling upon such an issue prior to an indictment being brought. The district court concluded that it was appropriate to rule upon the issue prior to an indictment because, otherwise, "if an indictment were later determined to have been wrongfully secured, it would be too late to prevent the irreparable consequences." Pet. App. 45a. The district court added:

> Our decision is guided by the Seventh Circuit which observed that "[t]he preferred procedure, absent exigent circumstances, would be for the government to seek relief from its obligations under the immunity agreement prior to indictment." [*United States v. Meyer*, 157 F.3d 1067, 1077 (7th Cir. 1998).] The court reasoned that the burden on the government to obtain a pre-indictment judicial determination is

> minimal because the government must eventually obtain one. *Id.* Resolving the issue of whether SNTG was in material breach of the agreement and whether DOJ is bound by the agreement now at the pre-indictment stage ensures that SNTG is afforded the requisite due process without imposing an undue burden on the government.

Pet. App. 45a-46a (footnote omitted).

In agreeing to refrain from bringing an indictment until the district court had resolved Stolt-Nielsen's and Wingfield's claims, the Division here essentially acquiesced in what the Seventh Circuit termed "[t]he preferred procedure."

5. The Third Circuit's Holding That The District Court Lacked Authority To Enjoin The Indictments

On the Antitrust Division's appeal, a two-judge panel of the Third Circuit reversed, *solely* on the legal basis that the district court did not have "authority" to enjoin the Executive Branch from filing an indictment under the circumstances of this case. The panel remanded with instructions that the district court dismiss the complaints with prejudice. Petitions for rehearing *en banc* were denied (but not before the panel made substantial modifications to the analysis in its opinion). Pet. App. 30a-31a, 22a-25a.

At the very outset of its opinion, the panel acknowledged: "This case raises a significant constitutional question of first impression in this Circuit: whether federal courts have authority, consistent with the separation of powers, to enjoin the executive branch from filing an indictment." Pet. App. 4a. On this critical question of judicial "authority" under the Constitution, the panel began by acknowledging decisions of this Court finding that federal courts do have authority to enjoin federal prosecutions in certain circumstances. Pet.

App. 23a (citing, *inter alia*, *Dombrowski v. Pfister*, 380 U.S. 479 (1965), and *Hynes v. Grimes Packing Co.*, 337 U.S. 86 (1949)). The panel, however, read those decisions as supporting authority to enjoin prosecutions only "to avoid a chilling effect on constitutional rights." Pet. App. 12a (as amended by Pet. App. 23a). The panel concluded that the authority of federal courts to enjoin prosecutions does not extend to circumstances in which a non-prosecution agreement is about to be breached.

The panel acknowledged the district court's reliance upon the Seventh Circuit decision in *Meyer*, and also acknowledged the declaration in *Meyer* that a pre-indictment determination of immunity under a non-prosecution agreement was not only authorized, but was "the preferred procedure, absent exigent circumstances." Pet. App. 13a. The panel even stated that it had "no quarrel" with the Seventh Circuit's observation that "in many circumstances" a pre-indictment determination of the parties' obligations under an immunity agreement "might be useful." Pet. App. 14a (as amended by Pet. App. 24a). Nevertheless, the panel declined to follow the Seventh Circuit, characterizing *Meyer*'s preferred procedure as "*dicta*" given that the Seventh Circuit determined that the agreement in that case entitled the defendant only to a judicial determination prior to conviction rather than prior to indictment.

The panel went on to treat the Amnesty Agreement here as a protection against conviction rather than against indictment and trial. Pet. App. 14a-21a. In support of this treatment, the panel relied heavily upon cases denying an interlocutory appeal upon the denial of a post-indictment motion to dismiss based on an assertion of statutory or contractual immunity. Pet. App. 14a-15a, 19a-20a. The panel viewed these cases as "instructive because they reinforce the narrowness of a defendant's ability to challenge

the Government's decision to pursue a prosecution." Pet. App. 18a.

While the panel acknowledged that its interpretation of non-prosecution agreements "may seem counterintuitive" (Pet. App. 17a), the panel did not attempt to reconcile this interpretation with the substantial and undisputed evidence here that the Antitrust Division enticed Stolt-Nielsen into the amnesty program and the Amnesty Agreement with the explicit promise that Stolt-Nielsen would be free from criminal prosecution, including indictment. Nor did the panel attempt to reconcile its interpretation with the substantial and undisputed evidence that the Division had purposefully elected to exercise and relinquish its prosecutorial discretion in the amnesty program and the Amnesty Agreement.

The panel also asserted that "simply being indicted and forced to stand trial is not generally an injury for constitutional purposes." Pet. App. 15a. The panel added: "[T]he District Court's finding that Stolt-Nielsen and Wingfield would be irreparably harmed by an indictment does not bring this case within the ambit of the cases in which injunctions against indictment and trial have been approved." Pet. App. 16a n.5.

REASONS FOR GRANTING THE PETITION

In holding that federal courts lack authority to enjoin prosecutors from breaching non-prosecution agreements, the Third Circuit decision creates an irreconcilable conflict with the Seventh Circuit on an important constitutional question under the Separation of Powers. Furthermore, contrary to the Third Circuit's suggestion, the Seventh Circuit's recognition of pre-indictment judicial authority cannot be dismissed as mere *dicta* in a single case, because the Seventh Circuit has repeatedly and emphatically instructed district courts and prosecutors in that circuit to conduct pre-indictment judicial proceedings, and these courts and prosecutors have heeded

the instruction to such an extent that such proceedings are the accepted practice within the Seventh Circuit.

The conflict created here is starkly illustrated by the proceedings in this very case, where the district court followed the Seventh Circuit rule in issuing an injunction only to have the Third Circuit reverse by adopting the new Third Circuit rule. As the Third Circuit decision was made purely as a matter of constitutional law, the conflict is squarely and discretely presented by this petition. Unless this Court resolves the conflict, disparate results, prosecutorial overreaching, and cynical forum-shopping are sure to ensue. These problems will recur not only in the important context of the Antitrust Division's Amnesty Program, but in any situation where prosecutors choose to enter into an agreement not to indict.

Finally, beyond the conflict on this important constitutional issue under the Separation of Powers, this petition raises other important issues central to this modern era in which corporations and their executives frequently find themselves in the cross-hairs of prosecutors. The Third Circuit blithely disregarded an express, bargained-for contractual promise not to prosecute, on the grounds that "simply being indicted" is unworthy of judicial protection. Such a conclusion not only re-writes the parties' bargain and ignores the due process interests created by the prosecutors' contractual promise, but is decidedly out of date in an era in which a "simple indictment" can cause irreparable or even ruinous injury to a corporation and its varied constituents. In fact, avoiding such potential ruin was an essential part of the enticement the Antitrust Division offered in order to obtain valuable evidence from Stolt-Nielsen here.

I. THE DECISION OF THE THIRD CIRCUIT CREATES A CONFLICT IN THE CIRCUITS ON AN IMPORTANT CONSTITUTIONAL QUESTION OF JUDICIAL AUTHORITY UNDER THE SEPARATION OF POWERS.

The decision by the Third Circuit here creates a conflict with the Seventh Circuit as to whether federal courts have the authority to prevent federal prosecutors from breaching non-prosecution agreements. Under the Third Circuit rule, federal courts are categorically powerless to consider prior to indictment whether a threatened prosecution would violate a non-prosecution agreement. Under the Seventh Circuit rule, in contrast, federal courts not only have the authority to determine whether a threatened prosecution would violate a non-prosecution agreement, but such a pre-indictment determination is emphatically endorsed as the "preferred procedure." Indeed, the Seventh Circuit has indicated that it views pre-indictment consideration as *required* in certain circumstances (i.e., where, as here, a defendant is promised not to be indicted).

Here, the district court expressly followed the Seventh Circuit rule by considering, prior to the threatened indictment of Petitioners, whether the Antitrust Division would be breaching the Amnesty Agreement in bringing the indictment. The district court found that the Division would be breaching the Amnesty Agreement, and enjoined the Division from doing so. In reversing, the Third Circuit declined to follow the Seventh Circuit rule, mistakenly considering it to be mere "*dicta.*" In fact, the Seventh Circuit, in exercise of its supervisory powers, has consistently directed the courts and prosecutors in its jurisdiction to conduct pre-indictment proceedings to address alleged breaches of non-prosecution agreements (except in exigent circumstances). This case thus presents a bona fide and irreconcilable conflict between the

circuits on an important constitutional question under the Separation of Powers.

A. The Seventh Circuit Emphatically Endorses Pre-Indictment Determinations Of Alleged Breaches Of Non-Prosecution Agreements.

The Seventh Circuit has over the course of the last two decades repeatedly endorsed pre-indictment judicial proceedings over an alleged breach of a non-prosecution agreement as the "preferred procedure." *United States v. Meyer*, 157 F.3d 1067, 1077 (7th Cir. 1998); *see also United States v. Ataya*, 864 F.2d 1324, 1330 n.9 (7th Cir. 1988) ("We now state our unqualified belief that such a [pre-indictment] procedure is most proper."); *United States v. Verrusio*, 803 F.2d 885, 889 (7th Cir. 1986) (describing pre-indictment determinations as the "better procedure").

Indeed, such pre-indictment proceedings are enshrined as accepted procedure in the Seventh Circuit. *E.g.*, *Verrusio*, 803 F.3d at 889-90 n.3 (7th Cir. 1986) ("We further note that a number of plea agreements that have appeared before this court expressly provide a particular procedure that the government must follow if it seeks to reindict the defendant. For example, one such agreement calls for the government to offer the defendant an opportunity to correct any breach on his part before the government can reindict him."); *United States v. Bielak*, 660 F. Supp. 818, 820 (N.D. Ind. 1987) (describing the pre-indictment determination that occurred in the case as the "proper procedure" in the Seventh Circuit); Michael D. Monico & Barry A. Spevack, *Federal Criminal Practice: A Seventh Circuit Handbook* § 107 (2005) ("[T]he favored procedure in these circumstances is for the government to secure a judicial determination that the defendant breached the immunity agreement pre-indictment.") (citing *Meyer*, 157 F.3d at 1077).

In the most recent Seventh Circuit case on the issue, *Meyer*, a defendant entered an immunity agreement with the Government in exchange for cooperation. Because the defendant already had been indicted, the agreement provided for dismissal of the indictment. Subsequently, the Government asserted that the defendant had breached the agreement, and the Government re-indicted him. Asserting the immunity agreement, the defendant moved to dismiss the indictment, and the district court denied his motion, finding that he had breached the agreement. On appeal after his conviction, the defendant argued that due process required a *pre*-indictment determination of whether he had breached his immunity agreement.

The Seventh Circuit reasoned that a "fundamental requirement of the due process clause is that an individual receive notice and the opportunity for a hearing before he is deprived of a significant property interest." *Meyer*, 157 F.3d at 1076 (citing *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 542 (1985) (holding that a pre-deprivation hearing is the "root requirement" of due process)).

The Seventh Circuit specified that:

> With respect to immunity agreements, due process "requires prosecutors to scrupulously adhere to commitments made to suspects in which they induce the suspects to surrender their constitutional rights in exchange for the suspects giving evidence that the government needs against others which simultaneously implicates themselves." . . .
>
> *Absent exigent circumstances, an individual is entitled to a judicial determination of his breach*

> *before being deprived of his interest in the enforcement of an immunity agreement.*

Meyer, 157 F.3d at 1076 (quoting *United States v. Eliason*, 3 F.3d 1149, 1153 (7th Cir. 1993), and citing *Verrusio*, 803 F.2d at 888 (7th Cir. 1986)) (emphasis added).

The Seventh Circuit proceeded to hold that the relevant defendant in that case, Hoff, was not entitled to a pre-indictment determination and that a post-indictment, pretrial determination sufficed where he already had been under indictment when he entered the agreement and, therefore, the agreement protected him from the "risk of conviction" rather than indictment. *Meyer*, 157 F.3d at 1077; *see also id.* ("Hoff's agreement provided that, in exchange for Hoff's performance, the government would dismiss the charge currently pending against him . . . .").

Critically, the Seventh Circuit emphasized that although a post-indictment determination was sufficient for that particular defendant on those facts, the court was reiterating a rule in favor of pre-indictment determinations:

> [W]e again stress that, in cases such as these, the *preferred procedure*, absent exigent circumstances, would be for the government to seek relief from its obligations under the immunity agreement *prior to indictment*. Since the government is required to obtain a judicial determination of a defendant's breach prior to trial, it is but a *de minimis* inconvenience for the government to secure that determination pre-indictment.

Meyer, 157 F.3d at 1077 (citing *Ataya*, 864 F.2d at 1330 n.9 (7th Cir. 1988)). The Seventh Circuit plainly was repeating an instruction, pursuant to its supervisory powers, to the district courts and federal prosecutors within its jurisdiction. *See generally Bank of Nova Scotia v. United States*, 487 U.S. 250, 254 (1988) ("In the exercise of its supervisory authority,

a federal court 'may, within limits, formulate procedural rules not specifically required by the Constitution or the Congress.'") (quoting *United States v. Hasting*, 461 U.S. 499, 505 (1983)).

The Seventh Circuit expounded the salutary effects of its rule: "A pre-indictment hearing would *curtail prosecutorial overreaching in drafting ambiguous immunity agreements* and, in cases in which the defendant had fulfilled his obligations under the agreement, would help to prevent the government from using the threat of criminal prosecution 'to achieve by coercion what it could not achieve through voluntary negotiation.'" *Meyer*, 157 F.3d at 1077 (quoting *Ataya*, 864 F.2d at 1330 n.9 (7th Cir. 1988)) (emphasis added).

Thus, in *Meyer*, the Seventh Circuit explained its rule that "an individual is entitled to a judicial determination of his breach before being deprived of his interest in the enforcement of an immunity agreement." 157 F.3d at 1076. An un-indicted corporation that is enticed into self-reporting illegal conduct under an Amnesty Agreement in which the Government promises "not to bring any criminal prosecution" against the corporation or its executives plainly possesses the interest the Seventh Circuit crafted its rule to protect — particularly where the Government repeatedly publicizes "amnesty" as meaning "not seeking indictment of corporations," Pet. App. 88a, 94a.

Furthermore, the Seventh Circuit's rule necessarily recognizes federal courts' authority to enforce the outcomes of their pre-indictment determinations — a result at loggerheads with the Third Circuit's holding in this case that the district court "lacked authority" to enforce its pre-indictment determination of the enforceability of the Amnesty Agreement. Pet. App. 21a.

B. The Third Circuit Bars Pre-Indictment Determinations Of Alleged Breaches Of Non-Prosecution Agreements.

In this case, the district court relied on *Meyer* to hold that, given the Antitrust Division's promise "not to bring any criminal prosecution against [Stolt-Nielsen]," the requisite judicial determination whether the Amnesty Agreement had been breached had to occur *pre*-indictment. Pet. App. 45a (citing *Meyer*, 157 F.3d at 1077).

The district court proceeded to enjoin the Antitrust Division from bringing an indictment against Petitioners, based on the court's pre-indictment finding that Petitioners had *not* breached the Amnesty Agreement. Pet. App. 49a. The Third Circuit reversed solely on the question of the district court's authority to have issued the injunction: "[W]e conclude that that District Court lacked authority to employ the extraordinary remedy of enjoining the Government's indictments of Stolt-Nielsen and Wingfield." Pet. App. 21a.

The Third Circuit never reached the merits of whether Petitioners had breached or complied with the Amnesty Agreement. (Thus, no factual issues obscure the legal issue presented here.) Instead, the reversal turned entirely on the timing of the district court's decision (i.e., pre-indictment). Indeed, the Third Circuit invited Petitioners to invoke the Amnesty Agreement post-indictment: "Stolt-Nielsen and Wingfield may interpose the Agreement (as a defense to conviction) in a pre-trial motion." Pet. App. 19a.

The Third Circuit based its rule against pre-indictment determinations on the Separation of Powers, and allowed only a narrow exception that the court held did not apply to this case: "Separation-of-power concerns thus counsel against using the extraordinary remedy of enjoining the Government from filing the indictments. *Although courts have carved out a narrow exception to this rule in those cases in which the*

very act of filing an indictment may chill constitutional rights, this case does not implicate that concern." Pet. App. 20a & 24a (amended opinion) (emphasis added).

As additional support for barring pre-indictment determinations, the Third Circuit misplaced reliance upon three cases denying interlocutory appeals from post-indictment motions to dismiss that had asserted a right not to be prosecuted. Pet. App. 14a-15a (citing *Heike v. United States*, 217 U.S. 423, 431 (1910); *United States v. Bailey*, 34 F.3d 683, 690-91 (8th Cir. 1994); *United States v. Bird*, 709 F.2d 388, 392 (5th Cir. 1983)). While not apparent from the Third Circuit's decision, the relevance of those cases is confined to the special circumstances of the "collateral order" doctrine of *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541 (1949), and the federal interest in strictly limiting interlocutory appeals in pending criminal cases. *See Heike*, 217 U.S. at 433 ("[T]he effect of the immunity statute in question is *not to change the system of appellate procedure* in the Federal courts, and give a right of review before final judgment in a criminal case . . . .") (emphasis added); *Bailey*, 34 F.3d at 691 ("[W]e hesitate to create a new collateral order exception *sua sponte* in light of the Supreme Court's clear intent to limit use of the exception."); *Bird*, 709 F.2d at 392 (same). *See generally Midland Asphalt Corp. v. United States*, 489 U.S. 794, 799, 801 (1989) ("We have interpreted the collateral order exception 'with the utmost strictness' in criminal cases"; "A right not to be tried in the sense relevant to the *Cohen* exception rests upon explicit statutory or constitutional guarantee that trial will not occur . . . .").

The Third Circuit thus bars pre-indictment determinations of the type that have been repeatedly endorsed as the "preferred procedure" in the Seventh Circuit. *Meyer*, 157 F.3d at 1077. Parties holding agreements not to indict have fundamentally different rights in the Seventh Circuit than in the Third. Unquestionably, the Seventh Circuit would have

reached the *opposite outcome* in this case — i.e., it would have affirmed the authority of the district court to enjoin the Antitrust Division — and that is the *touchstone for genuine conflict.*

C. In This Modern Era Of Corporate Prosecutions, This Irreconcilable Conflict Between The Circuits Requires This Court's Resolution.

In cases like this one, where the putative defendant is enticed by a promise of amnesty for a corporation and its directors, officers, and employees, Pet. App. 67a-69a, and the Government repeatedly and publicly describes "amnesty" as "not seeking indictment," *e.g.*, Pet. App. 85a, 94a, the putative defendant has a bargained-for interest in avoiding not only conviction, but indictment. In the Seventh Circuit, that type of interest can be protected by a pre-indictment determination of whether the non-prosecution agreement is enforceable or has been breached. In the Third Circuit, by contrast, the putative defendant must first be subjected to indictment and only subsequently learn through a post-indictment motion to dismiss whether the non-prosecution agreement is enforceable. By then, of course, the defendant will have suffered through the very experience it contracted to avoid — without any hope of ever being made whole.

In the modern era, indictment alone can destroy an individual's livelihood or company's business, while the ultimate determination of criminal liability can be far less important — as exemplified by Arthur Andersen's abrupt ruin despite the ultimate reversal of conviction by this Court. *See Arthur Andersen LLP v. United States*, 544 U.S. 696 (2005). Indeed, today's headlines are rife with other illustrations of the potential for an indictment to ruin a profitable enterprise: "An indictment is often a death knell for a company, as it was for KPMG's rival, Arthur Andersen." Lynnley Browning, *U.S. Tactic On KPMG Questioned, Judge Criticizes Legal-Fee Cutoff*, N.Y. TIMES, June 28, 2006, C1, C2.

This potential for financial ruin is particularly true in antitrust cases. The past two decades have seen a marked escalation of corporate antitrust fines. Fines of $500 million have been obtained, through guilty pleas, using evidence secured through the Amnesty Program. Pet. App. 101a. Antitrust Division officials boast that by preying on companies' fears of devastating fines the Division drives companies into the Amnesty Program. *E.g.*, Pet. App. 103a (Speech by Antitrust Division Director of Criminal Enforcement Scott D. Hammond, Sept. 12, 2000) ("When we revised our Amnesty Program, we sweetened the carrot by increasing the opportunities and incentives for companies to self report and cooperate. At the same time, our recent record of successful prosecutions and heavy sentences has sharpened the stick for companies who risk the alternative path.").

Given that reality, a conflict in the circuits over whether courts have the authority to determine the enforceability of non-prosecution agreements prior to indictment is intolerable, particularly for multi-circuit actors, like Petitioners, who potentially are subject to prosecution in either the Third or Seventh Circuits. Undoubtedly, this circuit conflict will encourage prosecutors to forum shop in favor of the Third Circuit when possible. Furthermore, the conflict here is fully developed, devoid of any necessity to resolve factual issues, and ripe for this Court's resolution.

II. THE THIRD CIRCUIT'S "CHILLING EFFECT" STANDARD MISAPPREHENDS THIS COURT'S PRECEDENTS AND ABDICATES JUDICIAL AUTHORITY.

In holding that federal courts have authority to enjoin federal prosecutions only where the prosecutions have a "chilling effect" on the exercise of constitutional rights, the Third Circuit erred in at least two fundamental respects. First, the "chilling effect" standard misapprehends this Court's precedents on when courts can enjoin prosecutions.

Second, and more fundamentally, the Third Circuit derived its "chilling effect" standard from the entirely wrong source of law to determine whether courts have the authority to adjudicate the enforceability of non-prosecution agreements pre-indictment. While the Third Circuit looked to this Court's general precedents on enjoining prosecutions, the dispositive body of law is *Santobello v. New York*, 404 U.S. 257 (1971), and its progeny governing the enforceability of agreements between prosecutors and defendants under the Due Process Clause.

A. This Court's Precedents Do Not Confine Courts' Authority To Enjoin Prosecutions To Those Having A "Chilling Effect On Constitutional Rights."

The Third Circuit relied on three of this Court's precedents as support for its holding that courts are authorized to enjoin prosecutions only "to avoid a chilling effect on constitutional rights." Pet. App. 12a (as amended by Pet. App. 23a) (citing *Dombrowski v. Pfister*, 380 U.S. 479, 486-87 (1965); *Hynes v. Grimes Packing Co.*, 337 U.S. 86, 98-99 (1949); *Truax v. Raich*, 239 U.S. 33, 38-39 (1915)). These precedents, either individually or collectively, do not support such a standard.

In *Dombrowski*, this Court addressed an injunctive action against the threatened criminal enforcement of a subversive activities law. A three-judge district court dismissed the action on abstention grounds and the Court reversed, noting in broad terms that an injunction was appropriate because the threatened prosecution chilled First Amendment rights:

> A criminal prosecution under a statute regulating expression usually involves imponderables and contingencies that themselves may inhibit the full exercise of First Amendment freedoms. . . . The assumption that defense of a criminal prosecution will

> generally assure ample vindication of constitutional rights is unfounded in such cases. . . . [W]e have not thought that the improbability of successful prosecution makes the case different. The *chilling effect upon the exercise of First Amendment rights* may derive from the fact of the prosecution, unaffected by the prospects of its success or failure.

Dombrowski, 380 U.S. at 486-87 (emphasis added).

Soon after *Dombrowski*, this Court clarified in *Younger v. Harris*, 401 U.S. 37 (1971), that *Dombrowski* does *not* stand for the proposition that First Amendment rights are elevated to dispositive significance above traditional bases for equitable relief when federal courts entertain injunctions of criminal prosecutions: "We recognize that there are some statements in the *Dombrowski* opinion that would seem to support this argument. But, as we have already seen, such statements were unnecessary to the decision of that case, because the Court found that the plaintiffs had alleged *a basis for equitable relief under the long-established standards*." 401 U.S. at 50 (emphasis added); *see, e.g.*, *Am. Library Ass'n v. Barr*, 956 F.2d 1178, 1188 (D.C. Cir. 1992) (noting "the Supreme Court's later restrictions of the broad implications of *Dombrowski*, notably in *Younger v. Harris*").

Nonetheless, in this case, the Third Circuit block-quotes the language above from *Dombrowski* and, in the panel's original opinion, expressly misreads *Dombrowski* as confining to the First Amendment context the authority of federal courts to enjoin criminal prosecutions. *See* Pet. App. 13a ("The question thus becomes whether, in those cases not concerning *First Amendment rights*, the authority to enforce cooperation or immunity agreements may be exercised pre-indictment in the form of an injunction.") (original opinion) (italics added).

Subsequently, "in response to a meritorious argument raised in Stolt-Nielsen's petition [for rehearing *en banc*]," Pet. App. 28a, the panel amended its opinion by removing the First Amendment limitation and announcing its current "chilling effect on constitutional rights" standard. Pet. App. 24a (amended opinion). In further response to Petitioners' arguments in their petitions for rehearing, the panel added its current citations to *Hynes* and *Truax*, (Pet. App. 12a (as amended by Pet. App. 23a)), which Petitioners had noted were ignored by the panel despite having been discussed prominently in Petitioners' merits briefs.

In *Hynes*, salmon canners sought an injunction of a threatened criminal prosecution under a Department of Interior regulation prohibiting fishing in certain coastal waters without obtaining a license and obeying certain restrictions of a local Native American tribe. 337 U.S. at 97-101. The canners argued that they could not challenge the regulation "in an ordinary criminal proceeding" without risking the seizure of their fishing equipment and other harmful penalties under the regulation. *Id.* at 99.

This Court affirmed the injunction of the prosecution, holding: "While ordinarily criminal prosecutions will not be restrained even under an invalid statute, a civil action will lie in exceptional circumstances that make an *injunction necessary to effectually protect property rights*." *Id.* at 98-99 (emphasis added). The Court added: "the '*danger of irreparable loss is both great and immediate*' and properly calls forth the jurisdiction of the court of equity." *Id.* at 100 (quoting *Parker v. Brown*, 317 U.S. 341, 349 (1943)) (emphasis added).

This Court reasoned similarly in *Truax*. In that case, an alien sought an injunction against the criminal prosecution of his employer under Arizona's law prohibiting the employment of aliens. 239 U.S. at 36. Threatened with imminent prosecution under the act, the employer had, in

turn, threatened to fire the alien. The Court held: "[W]hile a court of equity, generally speaking, has 'no jurisdiction over the prosecution, the punishment, or the pardon of crimes or misdemeanors,' a distinction obtains, and equitable jurisdiction exists to restrain criminal prosecutions under unconstitutional enactments, *when the prevention of such prosecutions is essential to the safeguarding of rights of property.*" *Id.* at 37-38 (emphasis added) (quoting *In re Sawyer*, 124 U.S. 200, 210 (1888)).

Thus, as a first principle, courts' injunctive powers lie foremost for the protection of property rights. For a more recent case affirming the vitality of this first principle, see, for example, *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 312 (1982) ("An injunction should issue only where the intervention of a court of equity 'is essential in order effectually to *protect property rights* against injuries otherwise irremediable.'") (quoting *Cavanaugh v. Looney*, 248 U.S. 453, 456 (1919)) (emphasis added). Notably, just this Term, the Court relied on *Weinberger* for the appropriate standard for permanent injunctive relief. *eBay Inc. v. MercExchange, L.L.C.*, 126 S. Ct. 1837, 1839 (2006).

Hynes and *Truax* exemplify that this first principle applies with equal force when the subject of the injunctive action is a threatened criminal prosecution. Yet, despite adding citations to *Hynes* and *Truax* to its amended opinion, the Third Circuit ignored entirely the holdings in those cases regarding property rights. Indeed, despite Petitioners' vigorous advocacy of the point, *the term "property rights" does not even appear in the Third Circuit's opinion.* Oddly, the Third Circuit viewed Petitioners' constitutionally protected property rights in the Amnesty Agreement as unworthy of protection because an indictment would have *destroyed* those rights rather than merely *chilled* them.

Thus, the Third Circuit misapprehended the law by ignoring the core injunctive function of protecting property

rights and, moreover, by holding that a "chilling effect on constitutional rights" is a prerequisite to enjoining a prosecution. That misapprehension of the law follows directly from the Third Circuit's reliance on the First Amendment statements in *Dombrowksi* that this Court clarified in *Younger v. Harris*. Indeed, the Third Circuit's "chilling effect" standard is plainly a remnant of its original, but subsequently amended First Amendment-only standard. *See* Pet. App. 28a.

Furthermore, the Third Circuit's misapprehension of the law was outcome-determinative in this case because the court foreclosed Petitioners' ability to obtain injunctive relief due to the purported absence of a "chilling effect": "Although courts have carved out a narrow exception to this rule in those cases in which the very act of filing an indictment may chill constitutional rights, this case does not implicate that concern." Pet. App. 20a (as amended by Pet. App. 24a).

Likewise, the Third Circuit ignored Petitioners' property rights in the Amnesty Agreement despite the court's view that Petitioners had demonstrated a danger of irreparable harm from the Antitrust Division's threatened indictment and revocation of the Amnesty Agreement:

> We note that the District Court's finding that Stolt-Nielsen and Wingfield would be irreparably harmed by an indictment does not bring this case within the ambit of the cases in which injunctions against indictment and trial have been approved.

Pet. App. 16a n.5.

The Third Circuit thus announced a clean, stark, and *incorrect rule of law* limiting federal courts' authority to enjoin federal prosecutions to circumstances involving a "chilling effect on constitutional rights."

B. The U.S. Constitution Binds Prosecutors To Their Agreements With Defendants, Notwithstanding Prosecutorial Discretion.

This Court held in *Santobello v. New York*, 404 U.S. 257, 262 (1971), that due process binds prosecutors to the terms of agreements bargained with defendants: "[W]hen a plea rests in any significant degree on a promise or agreement of the prosecutor, so that it can be said to be part of the inducement or consideration, such promise must be fulfilled." This Court thereby made clear that prosecutors' promises are worthy of the highest constitutional protections by federal courts. *E.g.*, *United States v. Aleman*, 286 F.3d 86, 90 (2d Cir. 2002) ("[D]ue process not only requires that the government adhere to the terms of any plea bargain or immunity agreement it makes, but also requires [the court] to construe agreements strictly against the government in recognition of its superior bargaining power . . . .") (citation and internal quotation marks omitted); *United States v. Hogan*, 862 F.2d 386, 388 (1st Cir. 1988) ("*Santobello* and its progeny proscribe not only explicit repudiation of the government's assurances, but must in the interests of fairness be read to forbid end-runs around them.") (citation and internal quotation marks omitted).

Courts uniformly apply *Santobello*'s directive beyond plea agreements to immunity, cooperation, and other non-prosecution agreements. *E.g.*, Pet. App. 13a ("It is also well established that the Government must adhere strictly to the terms of agreements with defendants — including plea, cooperation, and immunity agreements . . . .") (citing *Santobello*); *In re Extradition of Drayer*, 190 F.3d 410, 412 (6th Cir. 1999) ("[*Santobello*'s] logic has been extended to immunity agreements and to cooperation agreements[.]"); *United States v. Castaneda*, 162 F.3d 832, 835 (5th Cir. 1998) ("Nonprosecution agreements, like plea bargains, are contractual in nature, and are therefore interpreted in

accordance with general principles of contract law."); *United States v. Smith*, 976 F.2d 861, 863 (4th Cir. 1992) ("In interpreting immunity agreements, as with plea agreements, we must be mindful of the fact that the defendant's underlying contract right is constitutionally based and therefore reflects concerns that differ fundamentally from and run wider than those of commercial contract law.") (citation and internal quotation marks omitted).

A necessary corollary to *Santobello*'s directive is that in reaching binding agreements with defendants, prosecutors bargain away Executive Branch discretion. *E.g.*, *Wade v. United States*, 504 U.S. 181, 185 (1992) (noting that, under *Santobello*, a prosecutor's discretion would have been "superseded" by a plea agreement) (citing *Santobello*, 404 U.S. at 262-63); *United States v. Alegria*, 192 F.3d 179, 182 (1st Cir. 1999) ("As a general rule, nothing precludes a prosecutor from bargaining away something over which he has discretion in return for promises extracted from a criminal defendant."); *United States v. Doe*, 170 F.3d 223, 226, (1st Cir. 1999) ("The government can, under *Santobello*, limit itself by contract . . . ."); *United States v. Lezine*, 166 F.3d 895, 901 (7th Cir. 1999) ("[T]he Government limits its discretion when it enters into a plea agreement . . . ."); *United States v. Hernandez*, 17 F.3d 78, 82 (5th Cir. 1994) (holding that "discretion . . . can be bargained away by the government in a plea agreement"); *United States v. Watson*, 988 F.2d 544, 552 (5th Cir. 1993) ("Implicit in [*Santobello*'s] holding is the fact that the government may bargain away its discretion.").

Because such agreements result from prosecutors sacrificing prosecutorial discretion in exchange for prosecutorial objectives, the Separation of Powers does *not* impede courts' ability to enforce such agreements. *E.g.*, *Santobello*, 404 U.S. at 262-63 (holding that defendant who had "'bargained' and negotiated for a particular plea" was entitled to a judicial order for "specific performance of the

agreement"); *United States v. Carter*, 454 F.2d 426, 427-28 (4th Cir. 1972) ("If, after having utilized its discretion to strike bargains with potential defendants, the Government seeks to avoid those arrangements by using the courts, its decision so to do will come under scrutiny.") (quoting *United States v. Paiva*, 294 F. Supp. 742, 747 (D.D.C. 1969)) (internal quotation marks omitted); *United States v. Lieber*, 473 F. Supp. 884, 895 (E.D.N.Y. 1979) ("Ordering specific performance of the [plea] agreement does not constitute an interference with the functioning of the executive branch, any more than would ordering specific performance of a Government procurement contract. . . . It would be difficult to imagine a situation in which the court could justify, in a vacuum, an order that the executive branch purchase those goods. Yet, it is just as certain that if the executive did enter into such a contract and then breached it, the court could order its performance.").

Furthermore, there is nothing talismanic about the Government's power to bring indictments that prevents the Government from bargaining away that discretion. In an early corporate amnesty case, the Eighth Circuit held that federal prosecutors "breached" a non-prosecution agreement simply by bringing an indictment:

> Here, the Government urged corporations to voluntarily come forth and admit to and document illegal campaign contributions with the promise that such voluntary action might mitigate their criminal liability. 3M officials accepted this governmental overture and proceeded to fully divulge the nature and extent of their illegal activity. As we have indicated, the agreement between 3M and the Government contained a promise that the Government would forego future criminal prosecution of 3M and its officials for all matters arising out of the illegal political contribution scheme. This was not a

> traditional plea bargain arrangement in which the trial judge was a participant. Rather, it was a prosecutorial agreement, the inviolability of which rested completely in the province of the government prosecutors, who have the sole power and responsibility to institute criminal proceedings. *The Government breached this promise by returning the present indictment against defendants.*

United States v. Minn. Mining & Mfg. Co., 551 F.2d 1106, 1111-12 (8th Cir. 1977) (citation omitted) (emphasis added).

The Eleventh Circuit, too, has recognized that federal courts have the authority — indeed, the duty — to review the decisions of prosecutors that impact constitutional rights, despite prosecutors' invocation of the Separation of Powers doctrine. *Smith v. Meese*, 821 F.2d 1484, 1492 (11th Cir. 1987) ("The [federal prosecutor] defendants cannot cloak constitutional violations under the guise of prosecutorial discretion and expect the federal courts simply to look the other way.").

Here, not only did the Antitrust Division bargain away its prosecutorial discretion in the Amnesty Agreement, but the Division expressly touted its Amnesty Program as a purposeful relinquishment of its prosecutorial discretion. Pet. App. 126a (Speech by Antitrust Division Director of Criminal Enforcement Scott D. Hammond, Nov. 21-22, 2000) ("Our Amnesty Program by its nature is transparent because we have eliminated to a great extent, the exercise of prosecutorial discretion in its application."). Under these circumstances, the Division should not be heard to argue that its contractual promises are unenforceable under the Separation of Powers.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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July 20, 2006

PETITION
APPENDIX

APPENDIX A

PRECEDENTIAL

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 05-1480

STOLT-NIELSEN, S.A.;
STOLT-NIELSEN TRANSPORTATION GROUP LTD.;
RICHARD B. WINGFIELD

v.

UNITED STATES OF AMERICA

Appellant

Appeal from the United States District Court
for the Eastern District of Pennsylvania
(D.C. Civil Action No. 04-cv-00537)
District Judge: Honorable Timothy J. Savage

Argued September 30, 2005

[Slip Op. 2]

Before: ALITO* and AMBRO, Circuit Judges
RESTANI,** Judge

(Opinion filed: March 23, 2006)

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[Slip Op. 3]

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* Then Judge, now Justice, Alito heard oral argument in this case but was elevated to the United States Supreme Court on January 31, 2006. This opinion is filed by a quorum of the panel. 28 U.S.C. § 46(d).

** Honorable Jane A. Restani, Chief Judge, United States Court of International Trade, sitting by designation.

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[Slip Op. 4]

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OPINION OF THE COURT

AMBRO, Circuit Judge

This case raises a significant constitutional question of first impression in this Circuit: whether federal courts have authority, consistent with the separation of powers, to enjoin the executive branch from filing an indictment. Although federal courts have this authority in narrow circumstances, we conclude that this is not such a case and therefore reverse the District Court's judgment to the contrary. **[Slip Op. 5]**

I.

A. Background

Appellee Stolt-Nielsen, S.A., through its subsidiary Stolt-Nielsen Transportation Group Ltd. (collectively "Stolt-Nielsen" or the "Company"), is a leading supplier of parcel tanker shipping services. In March 2002, Stolt-Nielsen's general counsel, Paul O'Brien, resigned. According to a complaint O'Brien filed against Stolt-Nielsen in Connecticut Superior Court in November 2002, and a subsequent article in The Wall Street Journal, O'Brien advised his superiors of illegal collusive trading practices between Stolt-Nielsen and two of its competitors, and resigned after the Company failed to take action to resolve the problem. On receiving O'Brien's November 2002 complaint, Stolt-Nielsen hired John Nannes, a former Deputy Assistant Attorney General in the Antitrust Division at the U.S. Department of Justice, to conduct an internal investigation of possible antitrust violations by the Company and advise it regarding any criminal liability.

On November 22, 2002, Nannes met with the chairman of Stolt-Nielsen's tanker division, Samuel Cooperman.

Cooperman informed Nannes that O'Brien "rais[ed] some antitrust concerns" in early 2002, and that in response Stolt-Nielsen revised its antitrust compliance policy and disseminated it to its employees and competitors. Cooperman also told Nannes that he believed an internal investigation would **[Slip Op. 6]** demonstrate that the Company was in violation of federal antitrust laws and asked Nannes about the possibility of leniency from the Department of Justice. With Cooperman's permission, Nannes spoke with an Antitrust Division official later that day to inquire about amnesty if Stolt-Nielsen were to admit its violations, and the Government informed him that an investigation had already begun.

Specifically, Nannes inquired about possible protection for Stolt-Nielsen and its officers under the Antitrust Division's Corporate Leniency Policy. Under this Policy, the Government agrees "not [to] charg[e] a firm criminally for the activity being reported" if (in the case of an applicant who comes forward after an investigation has begun) seven conditions are met: (1) the applicant is the first to report the illegal activity; (2) the Government does not, at the time the applicant comes forward, have enough information to sustain a conviction; (3) the applicant, "upon its discovery of the illegal activity being reported, took prompt and effective action to terminate its part in the activity"; (4) the applicant's report is made "with candor and completeness and provides full, continuing and complete cooperation" with the Government's investigation; (5) the applicant confesses to illegal anticompetitive conduct as a corporation and not merely through individual confessions by corporate officers; (6) the applicant makes restitution where possible; and (7) the Government determines that granting leniency to the applicant would "not be unfair to others." The officers and directors of the corporation who assist with the **[Slip Op. 7]** investigation are considered for immunity from prosecution on the same basis as if they had come forward individually.

B. The Conditional Leniency Agreement

The Government informed Nannes that Stolt-Nielsen would not be eligible for amnesty under the Corporate Leniency Policy if O'Brien's departure was involuntary and due to his exposure of the Company's antitrust violations. Nannes assured the Government that O'Brien left voluntarily and detailed the changes to the Company's antitrust policy that were implemented in response to O'Brien's concerns. During the ensuing investigation, Nannes learned that between 1998 and 2001 a Stolt-Nielsen executive, Andrew Pickering, exchanged customer allocation lists with two of Stolt-Nielsen's competitors, presumably for the purpose of apportioning customers among the companies and restraining competition. In January 2003, Pickering's successor, appellee Richard Wingfield, provided Nannes with four such lists, which confirmed that Stolt-Nielsen had indeed engaged in illegal anticompetitive behavior. Nannes promptly turned these lists over to the Government, which entered into a Conditional Leniency Agreement (the "Agreement") with Stolt-Nielsen on January 15, 2003.

Under the terms of the Agreement, the Government agreed "not to bring any criminal prosecution against [Stolt-Nielsen] for any act or offense it may have committed prior to **[Slip Op. 8]** the date of this [Agreement] in connection with the anticompetitive activity being reported." This promise was, of course, subject to Stolt-Nielsen's strict compliance with the aforementioned conditions, "[s]ubject to verification [by the Government] and subject to [Stolt-Nielsen's] full, continuing and complete cooperation." The Agreement further stated:

> If the Antitrust Division at any time determines that [Stolt-Nielsen] has violated this Agreement, [it] shall be void . . . . Should the Antitrust Division revoke the conditional acceptance of [Stolt-Nielsen] into the

> Corporate Leniency Program, the Antitrust Division may thereafter initiate a criminal prosecution against [Stolt-Nielsen], without limitation. Should such a prosecution be initiated, any documentary or other information provided by [Stolt-Nielsen], as well as any statements or other information provided by any current or former director, officer, or employee of [Stolt-Nielsen] to the Antitrust Division pursuant to this Agreement, may be used against Stolt-Nielsen in any such **[Slip Op. 9]** prosecution.

The Agreement also provided that the Government would not prosecute officers and directors of the Company who "admit their knowledge of, or participation in, and fully and truthfully cooperate with the Antitrust Division in its investigation of the anticompetitive activity being reported." Specifically, that cooperation entailed: (1) producing all documents and records requested by the Government; (2) being available for Government interviews; (3) "responding fully and truthfully to all inquiries of the [Government] . . . without falsely implicating any person or intentionally withholding any information"; (4) voluntarily providing any information or materials not requested by the Government that were nonetheless relevant to the investigation; and (5) testifying under oath when asked by the Government. It concluded with a standard integration clause: "This letter constitutes the entire agreement between the [parties], and supersedes all prior understandings, if any, whether oral or written, relating to the subject matter herein."

Using the information provided by Stolt-Nielsen and its executives (including Wingfield), the Government secured guilty pleas from Stolt-Nielsen's co-conspirators, resulting in prison sentences for individual executives at those companies and fines totaling $62 million. **[Slip Op. 10]**

C. The Government Terminates the Agreement

In the weeks following execution of the Agreement, the Government's investigation revealed that Stolt-Nielsen's participation in the conspiracy persisted for several months after O'Brien raised his concerns to Cooperman in early 2002. The Government concluded that Stolt-Nielsen, and Wingfield in particular, continued to collude unlawfully with competitors until November 2002. Based on this information, the Government informed Nannes on April 8, 2003 that it was suspending Stolt-Nielsen's obligations under the Agreement and considering withdrawing the grant of conditional leniency entirely because the Company did not take "prompt and effective action to terminate its part in the anticompetitive activity being reported upon discovery of the activity," as required by the Agreement. One of Wingfield's subordinates, Bjorn Jansen, then admitted that the anticompetitive agreement between Stolt-Nielsen and its competitors was still in place in the fall of 2002, despite having told Nannes that such conduct ceased in March 2002 once the Company learned of O'Brien's allegations and issued its new antitrust policy.

In June 2003, the Government concluded that Wingfield had not fulfilled his obligations under the Agreement because he never informed the Government that his unlawful communications with Stolt-Nielsen's competitors did not cease in March 2002 when Stolt-Nielsen issued its new antitrust policy. On June 24, 2003, the Government charged Wingfield **[Slip Op. 11]** by criminal complaint with violating the Sherman Act, 15 U.S.C. § 1. The Government withdrew its grant of conditional leniency to Stolt-Nielsen on March 2, 2004, and announced that it intended to indict the Company and Wingfield for violations of the Sherman Act.[1]

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[1] Although the Government "charged" Wingfield by criminal complaint in June 2003, it could not prosecute him

D. District Court Proceedings

Shortly before the Government revoked Stolt-Nielsen's conditional leniency, the Company and Wingfield filed complaints in the United States District Court for the Eastern District of Pennsylvania seeking enforcement of the Agreement and an injunction preventing the Government from filing indictments against them. The Government agreed to postpone its indictments of both parties pending the District Court's consideration of the complaints.

The District Court bifurcated the proceedings into two phases. In Phase One, the Court considered whether Stolt- **[Slip Op. 12]** Nielsen's alleged conduct between March and November 2002 violated the terms of the Agreement. If so, Phase Two would determine whether the conduct actually occurred. During the Phase One proceedings, the District Court consolidated consideration of Stolt-Nielsen's and Wingfield's requests for preliminary injunctions with the trial on the merits, and heard testimony from Nannes and James Griffin, the Assistant Attorney General in charge of the Antitrust Division at the Department of Justice.

In January 2005, the District Court granted judgment in favor of Stolt-Nielsen and Wingfield and permanently enjoined the Government from indicting either of them for violations of the Sherman Act. See Stolt-Nielsen S.A. v. United States, 352 F. Supp. 2d 553 (E.D. Pa. 2005). The Court concluded that the Government could not unilaterally

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without an indictment. See 1 Charles Alan Wright, Fed. Practice & Procedure § 121, at 518 (3d ed. 1999) ("Although a criminal proceeding may be instituted by a complaint, this only permits issuance of a warrant for the arrest of the offender, and he cannot be tried unless an indictment or information, as the case may require, is brought against him.").

rescind the Agreement without a judicial determination that Stolt-Nielsen and Wingfield breached it, an issue appropriate for consideration before indictment "because if an indictment were later determined to have been wrongfully secured, it would be too late to prevent the irreparable consequences." Id. at 560. The Court further found that the Agreement did not specify a discovery date and instead granted amnesty for activity before January 15, 2003, the date on which it was signed. Indeed, it found that "the date when [Stolt-Nielsen] ended its participation [in the conspiracy] was never clearly established," id. at 562 n.10, and therefore, in light of the Agreement's integration clause, "DOJ, especially because it drafted the agreement, **[Slip Op. 13]** cannot depend upon a tacit understanding of what it contends was meant [to be the discovery date] but was not memorialized in the integrated agreement." Id. at 562. The Court concluded:

> The agreement immunizes [Stolt-Nielsen] from prosecution for activity prior to January 15, 2003. Now DOJ contends the activity had to have stopped at an earlier unspecified date that is not set forth in the agreement. Had it wanted to fix the date sometime before January 15, 2003, it could have replaced the words "to the date of this letter" with the earlier date it now contends the parties contemplated.
>
> . . . [The Government's] goals [in concluding the Agreement with Stolt-Nielsen] were to pursue [Stolt-Nielsen's] co-conspirators and break up the conspiracy. It got what it had bargained for in the agreement. . . . Now that it has received the benefit of the bargain, DOJ cannot prosecute the party that incriminated itself when it **[Slip Op. 14]** delivered the evidence DOJ used to accomplish its goals.

Id.

E. Appeal

On appeal, the Government contends that the District Court erred in two respects. First, it argues that federal courts lack jurisdiction to enjoin the executive branch from filing an indictment. Second, it asserts that the District Court erred in holding that Stolt-Nielsen's and Wingfield's actions between March and November 2002 did not violate the terms of the Agreement. For the reasons that follow, the District Court's judgment is reversed and the case remanded to that Court so that it may dismiss the appellees' complaints.[2]

II.

We review a District Court's grant or denial of a permanent injunction for abuse of discretion, United States v. Bell, 414 F.3d 474, 478 (3d Cir. 2005), but exercise plenary **[Slip Op. 15]** review over the District Court's underlying legal conclusions. Freethought Soc'y of Greater Phila. v. Chester County, 334 F.3d 247, 255–56 (3d Cir. 2003). A District Court's determination whether a cooperation agreement has been breached is a legal conclusion. United States v. Baird, 218 F.3d 221, 229 (3d Cir. 2000). All findings of fact are reviewed for clear error. See Bell, 414 F.3d at 478 (reviewing findings of fact related to a permanent injunction for clear error); Baird, 218 F.3d at 229 (reviewing findings of fact related to a cooperation agreement for clear error).

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[2] The District Court had jurisdiction over this case under 28 U.S.C. § 1331, as it is a civil action arising under the laws of the United States. Our jurisdiction arises under 28 U.S.C. § 1291, since the Government filed a timely notice of appeal from a final decision of the District Court.

III.

The Supreme Court has observed that the executive branch "has exclusive authority and absolute discretion to decide whether to prosecute a case," United States v. Nixon, 418 U.S. 683, 693 (1974), and the Government therefore argues that courts lack jurisdiction to enjoin a criminal prosecution. See United States v. Cox, 342 F.2d 167, 171 (5th Cir. 1965) (en banc) ("It follows, as an incident of the constitutional separation of powers, that the courts are not to interfere with the free exercise of the discretionary powers of the attorneys of the United States in their control over criminal prosecutions.").

There are exceptions to this general rule, however, usually to avoid a chilling effect on First Amendment rights. As the Supreme Court has recognized, **[Slip Op. 16]**

> [a] criminal prosecution under a statute regulating expression usually involves imponderables and contingencies that themselves may inhibit the full exercise of First Amendment freedoms. . . . The assumption that defense of a criminal prosecution will generally assure ample vindication of constitutional rights is unfounded in such cases. . . . [W]e have not thought that the improbability of successful prosecution makes the case different. The chilling effect upon the exercise of First Amendment rights may derive from the fact of the prosecution, unaffected by the prospects of its success or failure.

Dombrowski v. Pfister, 380 U.S. 479, 486–87 (1965); see also Ashcroft v. ACLU, 542 U.S. 656, 670–71 (2004) (upholding preliminary injunction against criminal enforcement of the Child Online Protection Act because, inter

alia, "[w]here a prosecution is a likely possibility, yet only an affirmative defense is available, speakers may self-censor rather than risk the perils of trial"). **[Slip Op. 17]**

It is also well established that the Government must adhere strictly to the terms of agreements made with defendants — including plea, cooperation, and immunity agreements — to the extent the agreements require defendants to sacrifice constitutional rights. See, e.g., Santobello v. New York, 404 U.S. 257, 262 (1971); United States v. Hodge, 412 F.3d 479, 485 (3d Cir. 2005) ("The government must adhere strictly to the terms of the bargains it strikes with defendants. Because defendants entering pleas forfeit a number of constitutional rights, courts are compelled to scrutinize closely the promise made by the government in order to determine whether it has been performed." (citation and internal quotation marks omitted)).

Therefore, although the Government is certainly correct that there is no free-ranging jurisdiction on the part of courts to enjoin criminal prosecutions, that authority does exist in limited situations, typically those where the mere threat of prosecution would inhibit the exercise of First Amendment freedoms. Federal courts also have jurisdiction to consider, and hold the Government to, the terms of agreements it makes with defendants. The question thus becomes whether, in those cases not concerning First Amendment rights, the authority to enforce cooperation or immunity agreements may be exercised pre-indictment in the form of an injunction.

The District Court relied on a Seventh Circuit case, United States v. Meyer, 157 F.3d 1067 (7th Cir. 1998), as **[Slip Op. 18]** authority for conducting a pre-indictment review of the Agreement before us. See Stolt-Nielsen, 352 F. Supp. 2d at 560–61. In Meyer, the Seventh Circuit stated, in dicta, that "the preferred procedure, absent exigent circumstances, would be for the government to seek relief from its obligations under the immunity agreement prior to

indictment. Since the government is required to obtain a judicial determination of a defendant's breach prior to trial, it is but a de minimis inconvenience for the government to secure that determination pre-indictment." 157 F.3d at 1077.

We have no quarrel with the Seventh Circuit's observation that, in many circumstances, a pre-indictment determination of the parties' obligations under an immunity agreement would be a good idea. As we explain below, however, federal courts (including the Seventh Circuit) agree that a pre-indictment determination is not required. Indeed, notwithstanding its dicta regarding the "preferred procedure," the Meyer Court held the defendant was constitutionally "entitled to a judicial determination of his breach before being deprived of his interest in the enforcement of an immunity agreement," and that this "interest" was in not being convicted, rather than not being indicted. Id. at 1076–77.[3] As the Court **[Slip Op. 19]** noted, "a post-indictment evidentiary hearing on the defendant's alleged breach was sufficient to satisfy due process." Id. at 1076 (citing United States v. Verrusio, 803 F.2d 885, 889 (7th Cir. 1986)).

Other immunity agreements that have promised not to charge or otherwise criminally prosecute a defendant, like the agreement at issue in this case, have likewise been construed to protect the defendant against conviction rather than indictment and trial. See, e.g., Heike v. United States, 217 U.S. 423, 431 (1910) (construing the Sherman Act's immunity provision, which protected a testifying witness from being "prosecuted," see Act of Feb. 25, 1903, ch. 755, § 1, 32 Stat. 854, 904 (repealed 1970), "not . . . to secure to a person making such a plea immunity from prosecution, but to

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[3] In keeping with the case law discussed below, the Seventh Circuit reached this conclusion despite the fact that the immunity agreement before it stated that the Government would not "charge" the defendant. Meyer, 157 F.3d at 1077.

provide him with a shield against successful prosecution, available to him as a defense"); United States v. Bailey, 34 F.3d 683, 690–91 (8th Cir. 1994) (holding that an agreement "not to prosecute" protected the defendant from "the inherent risk of conviction and punishment as a result of the trial, not the trial itself"); United States v. Bird, 709 F.2d 388, 392 (5th Cir. 1983) ("While the agreement is phrased in terms of nonprosecution, its essence is a promise of immunity. [The defendant's] immunity from punishment will not be lost simply because she is forced to stand trial."). **[Slip Op. 20]**

This distinction is grounded in the understanding that simply being indicted and forced to stand trial is not generally an injury for constitutional purposes but is rather "one of the painful obligations of citizenship." Cobbledick v. United States, 309 U.S. 323, 325 (1940); see Deaver v. Seymour, 822 F.2d 66, 69 (D.C. Cir. 1987) ("Although it is surely true that an innocent person may suffer great harm to his reputation and property by being erroneously accused of a crime, all citizens must submit to a criminal prosecution brought in good faith so that larger societal interests may be preserved.").[4] As the District of **[Slip Op. 21]** Columbia

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[4] We do not address in this opinion those circumstances in which equity might serve to enjoin an ultra vires prosecution brought in bad faith. The Supreme Court has only approved federal injunctions against state criminal proceedings on that basis. See Younger v. Harris, 401 U.S. 37, 55 (1971) (noting that, although "the possible unconstitutionality of a statute 'on its face' does not in itself justify an injunction against [a state's] good-faith attempts to enforce it," a "showing of bad faith [or] harassment" might "justify federal intervention"); see also Howard W. Brill, Equity and the Criminal Law, 2000 Ark. L. Notes 1, 3-4 (noting that state courts have sometimes used injunctions to prevent bad-faith prosecutions, such as those brought solely to "harass and to retaliate for the exercise of constitutional rights," or where the prosecutor

Circuit noted in Deaver, in the absence of an unconstitutional chilling effect on First Amendment rights, the adversary system "afford[s] defendants, after indictment, a federal forum in which to assert their defenses — including those based on the Constitution. Because these defendants are already guaranteed access to a federal court, it is not surprising that subjects of federal investigation have never gained injunctive relief against federal prosecutors." 822 F.2d at 69–70.[5] **[Slip Op. 22]**

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charges conduct that is not illegal). As our precedent makes clear, however, in the absence of a state prosecution, federal-state abstention doctrine is irrelevant and Younger does not apply. Pik-A-State Pa., Inc. v. Reno, 76 F.3d 1294, 1300 (3d Cir. 1996). Moreover, even if the principles of Younger or the willingness of certain state courts to entertain injunctions against bad-faith or illegal prosecutions could be applied to a federal prosecution, we perceive no bad faith on the part of the Government in this case; rather, the parties are engaged merely in a good-faith dispute over the meaning of the Agreement.

[5] We note that the District Court's finding that Stolt-Nielsen and Wingfield would be irreparably harmed by an indictment does not bring this case within the ambit of the cases in which injunctions against indictment and trial have been approved. Even assuming that irreparable harm is a factor that may properly be considered in deciding upon a permanent (as opposed to preliminary) injunction — which is a matter of some tension in our case law, compare Chao v. Rothermel, 327 F.3d 223, 228 (3d Cir. 2003) (stating that a permanent injunction may be granted "where the moving party has demonstrated that: (1) the exercise of jurisdiction is appropriate; (2) the moving party has actually succeeded on the merits of its claim; and (3) the 'balance of equities' favors granting injunctive relief"), and ACLU of N.J. v. Black Horse Pike Reg'l Bd. of Educ., 84 F.3d 1471, 1477 nn.2–3 (3d Cir.

Although this interpretation of agreements "not to prosecute" may seem counterintuitive, it comports with the federal courts' general reluctance to recognize a right not to be indicted or tried in the absence of an express constitutional (or perhaps statutory) command. In the context of interlocutory appeals challenging the Government's authority to proceed with a prosecution, for example, the Supreme Court has allowed those appeals only in very limited circumstances. For example, the Double Jeopardy Clause, see U.S. Const. amend. V ("[N]or shall any person be subject for the same offense to be twice put in jeopardy of life or limb . . . ."), protects interests that are "wholly unrelated to the propriety of any subsequent **[Slip Op. 23]** conviction," in that it provides a "guarantee against being twice put to trial for the same offense." Abney v. United States, 431 U.S. 651, 661 (1977) (emphasis added). Because the prohibition against double jeopardy affords a defendant the right to "contest[] the very authority of the Government to hale him into court to face trial on the charge against him," it necessitates an exception to the "firm congressional policy against

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1996) (en banc) (noting that a preliminary injunction requires consideration of, inter alia, irreparable injury, while a permanent injunction merely requires consideration of whether "the plaintiff has actually succeeded on the merits," and, if so, whether an injunction is an "appropriate remedy" (internal quotation marks omitted)), with Shields v. Zuccarini, 254 F.3d 476, 482 (3d Cir. 2001) (stating that a court may grant a permanent injunction if it finds, inter alia, that "the moving party will be irreparably injured by the denial of injunctive relief" (citing Black Horse Pike, 84 F.3d at 1477 nn.2–3)) — we note that, as stated above, other courts have not accepted the argument that the unpleasantness of an indictment brought in good faith constitutes an injury that may be remedied by a pre-indictment injunction, and neither have we.

interlocutory or 'piecemeal' appeals." Id. at 656, 659. Likewise, the Speech and Debate Clause, see U.S. Const. art. I, § 6, cl. 1 ("[F]or any speech or debate in either House, [members of Congress] shall not be questioned in any other Place."), has been construed "to protect Congressmen not only from the consequences of litigation's results but also from the burden of defending themselves," thus allowing interlocutory appeals from denials of claims of immunity under that Clause. Helstoski v. Meanor, 442 U.S. 500, 508 (1979) (internal quotation marks omitted).

Our case is not an interlocutory appeal, but the Supreme Court's cases in that field are instructive because they reinforce the narrowness of a defendant's ability to challenge the Government's decision to pursue a prosecution. Just as the authority to enjoin criminal enforcement of a law regulating speech is grounded in the overriding need to avoid a chilling effect on the exercise of core constitutional rights, so too does the right not to be prosecuted recognized in Abney and Helstoski stem from express textual commands in the Constitution that prohibit any interference with the rights against double jeopardy or of members of Congress to speak freely in legislative session. **[Slip Op. 24]**

In other contexts, however, courts have refused to allow interlocutory appeals to stop prosecutions. See, e.g., United States v. Hollywood Motor Car Co., 458 U.S. 263, 268 (1982) (per curiam) (holding that a vindictive prosecution claim may not be raised in an interlocutory appeal to stop an ongoing prosecution, but rather may only be raised after the defendant has been convicted, because "reversal of the conviction and . . . the provision of a new trial free of prejudicial error normally are adequate means of vindicating the constitutional rights of the accused"); Parr v. United States, 351 U.S. 513, 519 (1956) (holding that the mere fact a defendant would have to "hazard a trial" in one venue before challenging the District Court's order transferring his case

from a different venue did not warrant an interlocutory appeal); cf. United States v. P.H.E., Inc., 965 F.2d 848, 855 (10th Cir. 1992) (noting that, in comparing the vindictive prosecution claim in Hollywood Motor Car to a vindictive prosecution claim based on the defendants' dissemination of constitutionally protected speech, "[t]he wrong alleged is similar, but the right sought to be vindicated is not" because the "procedural rule [at issue in Hollywood Motor Car] raises concerns distinct from and less pressing than the courts' obligation to protect the First Amendment right not to be subjected to a pretextual prosecution"). Indeed, when a district court rejects prior to trial a defendant's contention that an immunity agreement bars his conviction, the defendant may not avail himself of an interlocutory appeal challenging that decision; rather, "the availability of dismissal after final judgment will adequately protect and secure for the defendant **[Slip Op. 25]** the benefit of his bargain under the nonprosecution agreement if he is entitled to it." Bailey, 34 F.3d at 691; see Bird, 709 F.2d at 392 (same).

Here, Stolt-Nielsen and Wingfield may interpose the Agreement (as a defense to conviction) in a pre-trial motion. See, e.g., Meyer, 157 F.3d at 1077 ("In accordance with due process, [the defendant] was entitled to a judicial determination that he had breached the agreement before being subjected to the risk of conviction. The district court's pretrial [but post-indictment] evidentiary hearing satisfied this requirement.").[6] **[Slip Op. 26]** But their contention that the

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[6] In our view, the pre-trial determination approved by the Seventh Circuit in Meyer does not conflict with the observations of the Fifth and Eighth Circuits that non-prosecution agreements of the sort involved in this case protect against the risk of conviction and punishment, not trial. See Bailey, 34 F.3d at 691; Bird, 709 F.2d at 392. For one thing, Bailey and Bird concerned attempted interlocutory appeals from district court denials of post-indictment claims

immunity they purportedly received under the Agreement precludes an indictment in the first place is belied by precedent, and we see no compelling reason to reach a different result in this case.

* * * * *

"[A] suit in equity does not lie where there is a plain, adequate and complete remedy at law . . . [that is] as complete, practical and efficient as that which equity could afford." Terrace v. Thompson, 263 U.S. 197, 214 (1923). Here, Stolt-Nielsen and Wingfield have a practical and efficient — and indeed complete — legal remedy available to them, i.e., access to a federal forum post-indictment in which they may assert the Agreement as a defense. Separation-of-power concerns thus counsel against using the extraordinary remedy of enjoining the Government from filing the indictments. Although courts have carved out a narrow exception to this rule in those cases in which the very act of filing an indictment may chill First Amendment rights, this case does not implicate that concern. Instead, we are guided by other cases in which the Supreme Court and Courts of Appeals have held that non-prosecution agreements may not form the basis for enjoining indictments before they issue.

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that immunity agreements barred conviction, and as such were not concerned with the timing of the claims in the district court. In any event, it is not in the interest of defendants or the Government, once an indictment has been issued, to proceed with a trial before determining whether an immunity agreement bars conviction. We therefore agree with the Seventh Circuit that a pre-trial hearing is appropriate in these circumstances. We note, however, that this timing is not essential, and a defendant may raise an immunity agreement as a defense during the trial.

In this context, we conclude that the District Court lacked authority to employ the extraordinary remedy of enjoining the Government's indictments of Stolt-Nielsen and Wingfield. The **[Slip Op. 27]** judgment is therefore reversed and the case remanded with the instruction that the District Court dismiss their complaints with prejudice.[7]

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[7] Because we conclude that the District Court lacked the power to enjoin the filing of indictments in this case, we need not consider, at this stage, the Government's alternative argument that the District Court inappropriately concluded that Stolt-Nielsen's and Wingfield's actions between March and November 2002 did not violate the terms of the Agreement. As stated, the District Court's lack of authority compels us to reverse the judgment and remand to that Court so that it may dismiss the complaints. Because the judgment is reversed, it lacks preclusive effect. See, e.g., Joseph A. ex rel. Wolfe v. Ingram, 275 F.3d 1253, 1266 (10th Cir. 2002) ("A judgment that has been vacated, reversed, or set aside on appeal is thereby deprived of all conclusive effect, both as res judicata and as collateral estoppel." (internal quotation marks omitted)). Therefore, if the appellees assert the Agreement as a defense after they are indicted, the District Court must consider the Agreement anew and determine the date on which Stolt-Nielsen discovered its anticompetitive conduct, the Company's and Wingfield's subsequent actions, and whether, in light of those actions, Stolt-Nielsen complied with its obligation under the Agreement to take "prompt and effective action to terminate its part in the anticompetitive activity being reported upon discovery of the activity."

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 05-1480

STOLT-NIELSEN, S.A.;
STOLT-NIELSEN TRANSPORTATION GROUP LTD.;
RICHARD B. WINGFIELD

v.

UNITED STATES OF AMERICA

Appellant

Appeal from the United States District Court
for the Eastern District of Pennsylvania
(D.C. Civil Action No. 04-cv-00537)
District Judge: Honorable Timothy J. Savage

Argued September 30, 2005

Before: ALITO* and AMBRO, Circuit Judges
RESTANI,** Judge

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* Then Judge, now Justice, Alito heard oral argument in this case but was elevated to the United States Supreme Court on January 31, 2006. This opinion is filed by a quorum of the panel. 28 U.S.C. § 46(d).

** Honorable Jane A. Restani, Chief Judge, United States Court of International Trade, sitting by designation.

(Opinion filed March 23, 2006)

ORDER AMENDING PUBLISHED OPINION

AMBRO, Circuit Judge

IT IS NOW ORDERED that the published Opinion in the above case filed March 23, 2006, be amended as follows:

On page 12, lines 7-8, replace "James Griffin, the Assistant Attorney General in charge of the Antitrust Division" with "James Griffin, a Deputy Assistant Attorney General in the Antitrust Division".

On page 15, at the bottom of page, replace the last three lines (from "There are exceptions" to "has recognized,") with the following: "There is an exception to this general rule, however, in order to avoid a chilling effect on constitutional rights. See Dombrowski v. Pfister, 380 U.S. 479, 486-87 (1965) (recognizing that the threat of criminal prosecution creates the potential for a serious chill upon First Amendment rights); Hynes v. Grimes Packing Co., 337 U.S. 86, 98-99 (1949) (recognizing that the threat of prosecution may deny fishermen the right to earn a livelihood); Truax v. Raich, 239 U.S. 33, 38-39 (1915) (recognizing that the threat of prosecution may lead to an unconstitutional denial of the right to earn a livelihood and to continue employment). The Supreme Court has typically applied this exception in the First Amendment context, and in such cases has recognized".

On page 16, at the beginning of the first line after the block quote, replace "Dombrowski v. Pfister, 380 U.S. 479, 486-87 (1965)" with "Dombrowski, 380 U.S. at 486-87 ".

On page 17, lines 4-5 in the second full paragraph, replace "situations, typically those where the mere threat of prosecution would inhibit the exercise of First Amendment freedoms" with "situations where the mere threat of prosecution would inhibit the exercise of constitutional freedoms".

On page 17, lines 8-11 in the second full paragraph, replace the sentence beginning "The question thus becomes" with "The question thus becomes whether, even when there is no risk of a chilling effect on constitutional rights, the existence of an immunity agreement provides federal courts with authority to enjoin a federal criminal prosecution in order to avoid the filing of an indictment."

On page 18, line 4 in the first full paragraph, replace "would be a good idea" with "might be useful".

On page 18, lines 4-6 in the first full paragraph, replace the sentence beginning "As we explain" with "We point out, however, that no federal court (including the Seventh Circuit) has held that a pre-indictment determination is constitutionally required."

On page 21, lines 1-2 at the top of the page, replace "an unconstitutional chilling effect on First Amendment rights" with "a chilling effect on constitutional rights".

On page 26, lines 12-13 in the first full paragraph, replace "may chill First Amendment rights" with "may chill constitutional rights".

On page 26, lines 14-15 in the first full paragraph, replace "cases in which the Supreme Court and Courts of Appeals have held" with "cases from the Supreme Court and Courts of Appeals that lead us to conclude".

On page 27, lines 2-3 in footnote 7, replace "need not" with "do not".

By the Court,

/s/ Thomas L. Ambro. Circuit Judge

Dated: May 16, 2006

ARL/cc: JPF; JJP; JAB; ADB; IAC; CMC; GAD; JMG; RDL

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 05-1480

STOLT-NIELSEN, S.A., et al.

v.

UNITED STATES OF AMERICA, Appellant

(U.S. District Court for the Eastern District of PA: No. 04-cv-00537)

Present: AMBRO, Circuit Judge and RESTANI, Judge of International Trade

Letter dated 03/24/06 construed as Motion by Appellant, USA, to Amend Opinion filed 03/23/06.

/s/ Aina R. Laws

Opinion filed 03/23/06 Case Manager 267-299-4957

ORDER

The foregoing motion is granted.

By the Court,

/s/ Thomas L. Ambro, Circuit Judge

Dated: May 16, 2006

ARL/cc: JPF; JJP; JAB; ADB; IAC; CMC; GAD; JMG; RDL

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

June 13, 2006

No. 05-1480

STOLT-NIELSEN, S.A., et al.

v.

UNITED STATES OF AMERICA, Appellant

(U.S. District Court for the Eastern District of PA:
No. 04-cv-00537)

Present: AMBRO, Circuit Judge and RESTANI, Judge of International Trade

Motion by Appellee, Stolt-Nielsen, S.A., for Leave to File a Reply in Support of Its Petition for Rehearing En Banc.

/s/ Aina R. Laws
Case Manager 267-299-4957

Opinion filed 03/23/06
Appellee's Reply Brief in Support of
Its Petition for Rehearing En Banc will
be filed only if the Court directs.

ORDER

Whereas, this Court filed an opinion and judgment in this case on March 23, 2006;

Whereas, appellee Stolt-Nielsen filed a petition for rehearing en banc on March 28, 2006, and appellee Richard B. Wingfield filed a petition for rehearing en banc on April 12, 2006;

Whereas, in response to a meritorious argument raised in Stolt-Nielsen's petition, this Court amended dicta in our opinion on May 16, 2006 to clarify the opinion's reasoning while retaining its holding against appellees;

Whereas, Stolt-Nielsen requested permission to file a new petition for rehearing in response to this Court's amendment, and this Court allowed Stolt-Nielsen to file a supplemental letter addressing any new legal issues it believed arose as a result of the amendment of our opinion;

Whereas, Stolt-Nielsen filed its supplemental letter on May 17, 2006, and characterized this Court's decision to amend the opinion (although done commonly in response to meritorious points in rehearing petitions that do not affect the outcome of the case) as "[a]typical[]," "a startling turnabout," "a fundamental change," et al.;

Whereas, this Court requested that the Government respond to Stolt-Nielsen's accusations pursuant to Internal Operating Procedures 9.5.2 and 9.5.6;

Whereas, the Government filed its answer to Stolt-Nielsen's petition for rehearing and supplemental letter on June 9, 2006;

Whereas, this Court did not request that Stolt-Nielsen respond to the Government's answer;

Whereas, Stolt-Nielsen nonetheless submitted a reply on June 13, 2006, along with a motion for leave to file; and

Whereas, Stolt-Nielsen's reply to the Government's answer is not contemplated by this Court's Internal Operating Procedures and, in any event, raises no new arguments, but instead accuses the Government of obfuscation, "an unseemly

bait-and-switch," "seriously mislead[ing] this Court," and "running roughshod over Stolt-Nielsen's constitutional rights."

NOW THEREFORE, Stolt-Nielsen's motion for leave to file a reply in support of its petition for rehearing en banc is DENIED.

By the Court,

/s/ Thomas L. Ambro, Circuit Judge

Dated: June 15, 2006

ARL/cc: JPF; JJP; JAB; ADB; IAC; CMC; GAD; JMG; RDL

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 05-1480

STOLT-NIELSEN, S.A.;
STOLT-NIELSEN TRANSPORTATION GROUP LTD.;
RICHARD B. WINGFIELD

v.

UNITED STATES OF AMERICA
Appellant

Present: SCIRICA, Chief Judge, McKEE, RENDELL, BARRY, AMBRO, FUENTES, SMITH, FISHER, VAN ANTWERPEN, CHAGARES, and ROTH,* Circuit Judges and RESTANI,** Judge

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* Pursuant to IOP 9.6.4, any judge participating in an en banc poll, hearing, or rehearing while in regular active service who subsequently takes senior status may elect to continue participating in the final resolution of the case. The petition was filed prior to Judge Roth assuming senior status. Judge Roth has elected to participate in this matter.

** Honorable Jane A. Restani, Chief Judge, United States Court of International Trade, sitting by designation, limited to panel rehearing only.

SUR PETITION FOR PANEL REHEARING WITH SUGGESTION FOR REHEARING *EN BANC*

The petition for rehearing (as supplemented) filed by Appellees having been submitted to the judges who participated in the decision of this Court, and to all the other available circuit judges in active service, and no judge who concurred in the decision having asked for rehearing, and no circuit judge of the circuit in regular active service having voted for rehearing by the court *en banc,* the petition for rehearing is DENIED.

By the Court,

/s/ Thomas L. Ambro, Circuit Judge

Dated: June 20, 2006

ARL/cc: JPF; JJP; JAB; ADB; IAC; CMC; GAD; JMG; RDL

APPENDIX E

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

July 10, 2006

No. 05-1480

STOLT-NIELSEN, S.A., et al.

v.

UNITED STATES OF AMERICA, Appellant

(U.S. District Court for the Eastern District of PA:
No. 04-cv-00537)

Present: AMBRO, Circuit Judge and RESTANI, Judge of International Trade

1. Joint Motion by Appellees to Stay the Mandate Pending the Filing of a Petition for Writ of Certiorari in U.S. Supreme Court.

2. Response by Appellant in Opposition to Motion to Stay the Mandate.

3. Reply in Support of Motion to Stay the Mandate of the Court by Appellees.

/s/ Aina R. Laws

Opinion filed 03/23/06. Case Manager 267-299-4957

ORDER

The foregoing motion is denied, as appellees have not demonstrated a likelihood that they will succeed in obtaining certiorari or a favorable decision on the merits from the Supreme Court. See, e.g., Rubin v. United States, 524 U.S. 1301, 1302 (Rehnquist, Circuit Justice 1998); Edwards v. Hope Med. Group for Women, 512 U.S. 1301, 1302-03 (Scalia, Circuit Justice 1994); Nanda v. Bd. of Trustees of the Univ. of Ill., 312 F.3d 852, 853-54 (7th Cir. 2002) (Ripple, J.).

By the Court,

/s/ Thomas L. Ambro, Circuit Judge

Dated: July 13, 2006
ARL/cc: JPF; JJP; JAB; ADB; IAC; CMC; GAD; JMG; RDL; PM; JKV; SH; SMO

APPENDIX F

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

STOLT-NIELSEN S.A. and	:	**CIVIL ACTION**
STOLT-NIELSEN	:	
TRANSPORTATION GROUP LTD.	:	
	:	
v.	:	**NO. 04-CV-537**
	:	
UNITED STATES OF AMERICA	:	

MEMORANDUM AND ORDER

Savage, J. **January 14, 2005**

In this civil action where we are asked to enjoin the government from prosecuting the plaintiffs for criminal antitrust violations, we must first answer two threshold questions. First, can the government unilaterally rescind an immunity agreement without a judicial determination that the other party breached the agreement? Second, if it can not, should the determination be made before or after indictment? Balancing the government's prosecutorial discretion and a party's due process rights under an immunity agreement, we conclude that due process dictates that a court must decide whether there has been a breach of the agreement before it can be voided, and the decision should be made before indictment.

Having concluded that we can and should decide now whether the government is entitled to void the immunity agreement in this case, we must then consider the dispositive question – did the plaintiff Stolt-Nielsen Transportation Group ("SNTG") breach its agreement with the United States

Department of Justice? SNTG contends that the Department of Justice ("DOJ") improperly attempted to void the immunity agreement and to prosecute it after it had fulfilled its promise to cooperate in DOJ's investigation of its co-conspirators. DOJ counters that it was entitled to rescind the agreement because SNTG breached it by misrepresenting that it had terminated its part in the targeted antitrust conspiracy earlier than it actually had and that the failure to correct this misrepresentation after the agreement was executed constituted non-cooperation.

We find that SNTG performed its obligation under the agreement when it supplied DOJ with self-incriminating evidence that led to the successful prosecution of SNTG's co-conspirators. Because DOJ got the benefit of its bargain, it cannot avoid fulfilling its promise based upon an understanding it contends the parties intended during negotiations but is not clearly defined in the integrated agreement. Thus, because SNTG did not breach the agreement, we shall enjoin DOJ from prosecuting and indicting SNTG[1] for its part in the antitrust conspiracy to the date of the agreement.

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[1] The action was instituted by the plaintiffs Stolt-Nielsen, S.A. and Stolt-Nielsen Transportation Group Ltd. Stolt-Nielsen, S.A. is the parent company of Stolt-Nielsen Transportation Group Ltd., and was not a signatory to the agreement. For simplicity, we shall refer throughout to both plaintiffs collectively as SNTG.

The agreement also covers SNTG employees. Wingfield, an SNTG executive, was charged with having violated the Sherman Act for his involvement in the conspiracy. He then filed his own action. Both SNTG and Wingfield's actions were consolidated on May 26, 2004.

I.

DOJ, charged with criminal enforcement of the United States antitrust laws, entices companies to report their involvement in ongoing antitrust conspiracies and to cooperate in the investigation and prosecution of co-conspirators by offering the reporting companies and their officers, directors and employees immunity from criminal prosecution under its Corporate Leniency Program ("Amnesty Program"). Only the first company to come forward gets the protection. Later applicants and co-conspirators are subject to prosecution and the cost of defending against criminal charges. Therefore, time is of the essence to secure immunity under the Amnesty Program.

SNTG, a division of Stolt-Nielsen, S.A., is an international carrier of bulk liquids, using parcel tankers which are deep-sea vessels with climate controlled compartments. SNTG competes primarily with two other carriers for international parcel tanker business.

Because a carrier loses money when its ships are idle or empty, it wants to keep the tankers at full capacity in a regular geographic rotation, unloading and loading at each port along an endless route. If a company loses a customer along a shipping route, it must find a new one or run that leg of the route while incurring operating costs without income.

One way owners can ensure that their ships stay at maximum capacity and maintain a continuous route is by dividing and allocating customers and routes through agreements to fix bids and prices. This practice is illegal.

Through conscious parallelism, owners tend to keep their respective routes and customers without actually agreeing among themselves to do so. It occurs when, in considering whether to bid on a competitor's contract, an owner self-consciously takes into account not only the price it would take to win the contract but also whether the newly-created

space aboard the competitor's ship frees the competitor to compete for one of its existing contracts. This unilateral net effect analysis is not illegal.

SNTG and its competitors in the international parcel tanker business divided routes and customers for several years. These arrangements raised the apprehension of illegal collusion that exposed the companies to criminal liability and invited participation in DOJ's Amnesty Program. SNTG's efforts to seek immunity from prosecution for its participation in the unlawful conspiracy precipitated the events giving rise to this dispute.

In late 2002, John Nannes ("Nannes"), a former deputy in the Department of Justice's Antitrust Division, was asked by SNTG's outside counsel, Gary Sesser ("Sesser"), to meet with an unidentified client on a potential antitrust matter. Nannes agreed. On November 22, 2002, he met with SNTG Chairman Samuel Cooperman ("Cooperman"), Sesser and other SNTG attorneys. Cooperman explained to Nannes that he recently learned that an attorney, who claimed to have documentary evidence of potential antitrust activity by SNTG, had been contacting SNTG customers to solicit them to institute antitrust litigation.

During the meeting, Nannes learned that SNTG's former in-house counsel, Paul O'Brien ("O'Brien"), had raised antitrust concerns in a memorandum to Cooperman in February 2002. Cooperman explained that as a result of O'Brien's warning, SNTG strengthened its internal antitrust compliance program. Soon after, O'Brien resigned from SNTG.

Nannes outlined DOJ's Amnesty Program. He informed Cooperman that because DOJ encourages early reporting of potential antitrust conspiracies, it is beneficial for companies to come forward without having first conducted an internal investigation into the nature of the anticompetitive activity.

The reporting company is given a marker to reserve its place in line for eligibility while it conducts an investigation to determine whether its activity was indeed illegal. If the investigation ultimately confirms the existence of a conspiracy violating antitrust laws, the company is accepted into the program and given immunity. The protection is conditioned upon the company's continuing cooperation with DOJ.

Cooperman authorized Nannes to contact DOJ about participating in the Amnesty Program. He conceded that Nannes' investigation of SNTG would probably reveal some activity giving the company reason to apply for amnesty. At that point, however, Nannes did not have sufficient information from which he could conclude that SNTG had engaged in an unlawful antitrust conspiracy.[2]

Later that day, after he was retained to represent SNTG, Nannes contacted his former colleague at the Department of Justice, James A. Griffin ("Griffin"), the Deputy Assistant Attorney General for the Antitrust Division, to inquire whether DOJ had opened an investigation into the parcel tanker industry and, if it had, whether DOJ had given a marker. Nannes and Griffin exchanged a series of exploratory telephone calls during which they shared vague pieces of information about the possible collusive activity. During one of the conversations, Griffin told Nannes that he knew of a company that fired a lawyer who had brought to its attention an antitrust violation. Griffin advised Nannes that if his client was that company, it could be an impediment to admission into the Amnesty Program. Although SNTG was never mentioned by name during these conversations, Nannes

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[2] Complicating Nannes' ability to determine whether SNTG had engaged in criminal activity was that conscious parallelism resulted in a high stability of contract renewal in the parcel tanker industry.

suspected that Griffin had been referring to SNTG.

Nannes concluded that DOJ had not yet granted a marker to anyone in the parcel tanker industry, thus presenting SNTG with an opportunity to be first in line if it could resolve the "fire the messenger" concern Griffin had raised. Because time was of the essence, Nannes arranged a meeting with DOJ to address O'Brien's termination.

At a meeting on December 4, 2002, after Nannes disclosed the identity of his client,[3] he was warned that if O'Brien had been fired for exposing actual antitrust violations, SNTG would be ineligible for the Amnesty Program. In response, Nannes assured Griffin and the DOJ attorneys that whether O'Brien had resigned or been fired was irrelevant because management had heeded O'Brien's admonitions by implementing remedial steps to enhance its antitrust compliance program, which O'Brien himself had crafted.[4] At the conclusion of the meeting, Griffin advised Nannes that SNTG would not be accepted into the Amnesty Program if the company had only pretended to take effective action to withdraw from the conspiracy.

On December 17, 2002, SNTG received confirmation that it had been given a "marker" establishing its first place in line for the Amnesty Program. As was customary upon receipt of a marker, Nannes commenced his internal investigation.

Nannes met with Richard Wingfield, the Managing

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[3] The disclosure of the company's name at the meeting was unique to the amnesty application process because the identity of the reporting company is usually kept anonymous until after the official proffer. However, in an effort to diffuse DOJ's concerns over the "fire the messenger" problem, Nannes elected to reveal SNTG's identity.

[4] O'Brien has since instituted a wrongful termination suit against SNTG in Connecticut state court.

Director of Tanker Trading for SNTG, who gave Nannes three customer lists which had been shared by SNTG and its co-conspirators. He later supplied Nannes with a fourth list that specifically allocated customer contracts among SNTG and its competitors. Nannes concluded that, by exchanging customer lists, SNTG and its co-conspirators had agreed to divide customers by trade lanes, an arrangement that constituted a *per se* unlawful agreement.[5] Knowing then that SNTG had criminal exposure for violating the antitrust laws, Nannes hastened to expedite the official proffer so he could secure immunity for SNTG.

On January 8, 2003, Nannes made the proffer to DOJ. He revealed that for several years SNTG had express agreements with its competitors to divide customers using allocation lists negotiated and agreed upon by the companies. No one asked and no one said when, if at all, SNTG's part in the arrangement had ceased.

After DOJ conducted additional investigation, it notified SNTG that it would be accepted into the Amnesty Program. On January 14, 2003, Griffin sent Nannes DOJ's model corporate leniency letter. At Nannes' suggestion, the model letter was revised to cover all SNTG subsidiaries and affiliates. The agreement was executed the following day.

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[5] Nannes explained that because competition in the parcel tanker industry is normally low, evidence of the exchange of customers lists was essential to the government because collusion would be difficult to prove without clear evidence of an agreement between the conspirators. He learned that there are legal joint ventures in the industry which require competitors to frequently communicate with one another. The documents produced by SNTG eliminated any plausible claim that the bidding was the product of a joint venture or conscious parallelism.

II.

To induce DOJ to accept it into the Amnesty Program, SNTG made certain representations required by DOJ. It asserted that it "took prompt and effective action to terminate its part in the anticompetitive activity being reported upon discovery of the activity," did not coerce any other party to participate in the activity, and was not the leader or the originator of the activity. These standard representations are recited in the agreement.

The entire agreement between the parties is set forth in the letter of January 15, 2003. It defines the respective obligations of the parties.

DOJ agreed "not to bring any criminal prosecutions against SNTG for any act or offense it may have committed prior to the date of this letter [January 15, 2003] in connection with the anticompetitive activity being reported," that is, the anticompetitive collusion in the parcel tanker industry involving transportation to and from the United States. In consideration for the promise of immunity, SNTG agreed to provide "full, continuing and complete cooperation" with respect to the facts relating to the activity; to provide all documents requested by DOJ; to secure the cooperation of its directors, officers and employees, including facilitating their appearing for interviews or testimony; to verify the completeness and truthfulness of the information provided by them; to take steps to insure that no one attempts to falsely protect or implicate any person or entity; and to make restitution to any person or entity injured as a result of the activity in which SNTG participated.

Because SNTG's discharge of its obligation required the cooperation of its directors, officers and employees in the investigation, DOJ agreed not to prosecute them "for any act or offense committed prior to the date of this letter in connection with the anticompetitive activity reported."

Conversely, any director, officer or employee who failed to comply with his or her obligations would not receive immunity and any statement or information provided by such a person could be used against him or her in a prosecution.

DOJ reserved the right to declare the agreement void and to revoke the "conditional acceptance of SNTG into the Corporate Leniency Program." In the event of revocation, DOJ could prosecute SNTG and use any statements or information provided by it in the prosecution.

III.

After the agreement was executed on January 15, 2003, SNTG turned over incriminating documents to DOJ and produced two employees, Andrew Pickering and Bjorn Jansen, who explained how the customer lists were exchanged among the conspirators. Using this critical information, DOJ successfully prosecuted Odfjell Seachem AS ("Odfjell") and Jo Tankers BV ("Jo Tankers"), obtaining guilty pleas resulting in fines totaling $62 million. DOJ also secured guilty pleas and prison sentences in prosecutions of individual executives of both companies.

On April 8, 2003, DOJ suspended SNTG's participation in the Amnesty Program because it claimed that SNTG did not cease its part in the illegal activity in March 2002, but continued the illegal activity into the second half of 2002. Two and a half months later, on June 24, 2003, plaintiff Richard Wingfield was arrested and charged with participating in the conspiracy to allocate customers, fixing prices and rigging bids between March 2001 and October 2002.

Under threat of indictment, SNTG filed a complaint on February 6, 2004, seeking enforcement of its rights under the agreement. On February 12, 2004, DOJ agreed to provide the court *in camera* notice prior to seeking an indictment of SNTG. Wingfield filed a complaint on February 18, 2004,

seeking to enforce his own rights under the amnesty agreement. On February 24, 2004, Wingfield's attorneys sought a preliminary injunction preventing DOJ from seeking his indictment. On February 27, 2004, SNTG filed a motion requesting a pre-indictment hearing.

On March 2, 2004, DOJ formally revoked SNTG's conditional leniency and notified SNTG that it intended to seek SNTG's indictment on March 24, 2004. In response, SNTG filed a motion for preliminary injunction to enjoin DOJ from seeking an indictment. DOJ agreed to delay indicting SNTG until the conclusion of these proceedings.

An evidentiary hearing was held on April 13 and 14, 2004, at which Nannes and Griffin testified. At the conclusion of the hearing, the parties agreed that because this matter had advanced to a trial on the merits,[6] the plaintiffs were not required to show irreparable injury. The parties then filed post-hearing briefs and proposed findings of fact.

IV.

Cooperation agreements are binding contracts. *See United States v. Baird*, 218 F.3d 221, 229 (3d Cir. 2000); *United States v. Nolan-Cooper*, 155 F.3d 221, 236 (3d Cir. 1998); *United States v. Isaac*, 141 F.3d 477, 481 (3d Cir. 1998). Both parties must abide by the terms of the agreement and are obligated to fulfill their respective obligations under it. *See Santobello v. New York*, 404 U.S. 257, 262 (1971); *see also United States v. Aleman*, 286 F.3d 86, 89-90 (2d Cir. 2002). Consequently, if the other party does not perform, it loses the benefit of the bargain and the government is relieved of its obligations under the contract. On the other hand, if the other party does perform, the government must keep its promise.

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[6] Tr. 4/14/04 (P.M.) at 68-69. A hearing on an application for preliminary injunction may be consolidated with the trial of the action on the merits. FED. R. CIV. P. 65.

See United States v. Moscahlaidis, 868 F.2d 1357, 1361 (3d Cir. 1989); *see also Aleman*, 286 F.3d at 91.

Immunity agreements, like plea agreements,[7] affect the due process rights of the party giving up valuable constitutional rights in return for the government's promise not to prosecute. *Baird*, 218 F.3d at 229; *see also Aleman*, 286 F.3d at 90. As the Second Circuit has stated, these agreements are "unique contracts in which special due process concerns for fairness and the adequacy of procedural safeguards obtain." *In re Altro*, 180 F.3d 372, 374-75 (2d Cir. 1999) (citation omitted). Due process requires prosecutors to "scrupulously adhere to commitments made to suspects in which they induce the suspects to surrender their constitutional rights in exchange for the suspects giving evidence that the government needs against others which simultaneously implicates themselves." *United States v. Meyer*, 157 F.3d 1067, 1076 (7th Cir. 1998) (quoting *United States v. Eliason*, 3 F.3d 1149, 1153 (7th Cir. 1993)).

Because due process is implicated, the government cannot unilaterally declare an immunity agreement void. *Meyer*, 157 F.3d at 1076 (quoting *United States v. Verrusio*, 803 F.3d 885, 888 (7th Cir. 1986)); *United States v. Castaneda*, 162 F.3d 832, 836 (5th Cir. 1998). Instead, due process demands that the government first obtain a judicial determination that the defendant breached the agreement. *Meyer*, 157 F.3d at 1076. Accordingly, the other party is entitled to a judicial ruling before the government can rescind the agreement.

DOJ and SNTG made mutual promises. SNTG waived its constitutional rights and exposed itself to criminal liability by

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[7] The rights created by an immunity agreement are no different than those implicated in plea agreements. *See United States v. Castaneda*, 162 F.3d 832, 835-36 (5th Cir. 1998). Thus, the same principles apply to both.

divulging incriminating information in exchange for DOJ's promise not to prosecute. Therefore, due process requires that before its amnesty can be revoked, SNTG is entitled to a judicial determination whether it breached the agreement.

When should the judicial resolution be made – before or after indictment? The government argues that the plaintiff may raise the issue in a motion to dismiss after indictment. SNTG counters that the time is now – before it is forced to challenge an indictment and suffer the consequences of one. We agree that SNTG is entitled to a decision before the government pursues a prosecution because if an indictment were later determined to have been wrongfully secured, it would be too late to prevent the irreparable consequences.[8]

Our decision is guided by the Seventh Circuit which observed that "[t]he preferred procedure, absent exigent circumstances, would be for the government to seek relief from its obligations under the immunity agreement prior to indictment." *Meyer*, 157 F.3d at 1077.[9] The court reasoned

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[8] "[A] wrongful indictment . . . works a grievous, irreparable injury to the person indicted" resulting in damage to the person's reputation which, because the public remembers the accusation and suspects guilt, can not be simply cured by a subsequent finding of not guilty. *In re Fried*, 161 F.2d 453, 458-59 (2d Cir. 1947).

[9] In *Meyer*, defendants Hoff and Meyer, who were charged in a drug trafficking conspiracy, entered into immunity agreements with the government and implicated their co-conspirators while incriminating themselves. *Meyer*, 157 F.3d at 1071. Under the agreements, the government promised not to use any statements made by the defendants regarding their involvement in the conspiracy's criminal activities in any criminal proceeding. *Id.* After interviewing additional witnesses, the government concluded that Hoff and Meyer's answers to the government's questions were

that the burden on the government to obtain a pre-indictment judicial determination is minimal because the government must eventually obtain one. *Id.* Resolving the issue of whether SNTG was in material breach of the agreement and whether DOJ is bound by the agreement now at the pre-indictment stage ensures that SNTG is afforded the requisite due process without imposing an undue burden on the government.

In reliance on the agreement, SNTG supplied DOJ the information essential to DOJ's successful prosecution of SNTG's co-conspirators. By cooperating with DOJ, SNTG gave up significant constitutional rights. *See Nolan-Cooper*, 155 F.3d at 236. At the same time it provided evidence against its co-conspirators, SNTG incriminated itself in the same illegal activities. Now the government wants to use SNTG's self-incriminating evidence against it and Wingfield in a prosecution against them.

Weighing the government's interest in maintaining prosecutorial discretion against a party's due process rights, we conclude that the government's interest will not be significantly compromised by a judicial proceeding and decision prior to indictment rather than later after the other party's interest will have been adversely affected. If the court

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incomplete and untruthful. Hoff and Meyer were subsequently indicted. *Id.* at 1072. Hoff filed a motion to dismiss. *Id.* The magistrate judge and district judge each held an evidentiary hearing and determined that the government had met its burden of demonstrating that Hoff had breached the agreement. *Id.* On review, the Seventh Circuit agreed with the district court's ultimate conclusion, but also emphasized the importance of requiring the government to seek a judicial determination of whether a party is in breach of an immunity agreement prior to indicting him. *Id.* at 1077.

determines that DOJ is correct that SNTG breached the agreement, DOJ can indict. If not, SNTG will have been saved from being wrongfully indicted and harmed as a result.

VI.

Because a party surrenders valuable constitutional rights when entering into an immunity agreement, a court must carefully scrutinize the agreement to determine whether the government has performed. *Nolan-Cooper*, 155 F.3d at 236. In doing so, the court must strictly construe the agreement against the government. *Baird*, 218 F.3d at 229. The government cannot rely on a "rigid and literal' construction of the terms of the agreement. *Id.* Applying these principles and recognizing that immunity agreements are interpreted in light of "special due process concerns," we turn to the agreement here. *Id.* (citation omitted).

SNTG and DOJ entered into DOJ's standard corporate amnesty agreement. In exchange for SNTG's revelations and cooperation, DOJ agreed not to bring any criminal prosecutions against SNTG for any act or offense it may have committed prior to January 15, 2003, the date of the agreement.

After SNTG had provided the information that led to the government's securing several convictions and the break-up of the conspiracy, DOJ unilaterally rescinded the agreement. It did not and does not claim that SNTG failed to cooperate in the investigation or withheld evidence necessary to DOJ's successful prosecution of SNTG's co-conspirators. Rather, its justification for revoking SNTG's amnesty is that SNTG misrepresented when its participation in the anticompetitive activity had ended. DOJ argues that March 2002 was understood to be the date SNTG said it had discovered the anticompetitive activity and implemented prompt and effective steps to end its participation in it.

Did DOJ and SNTG agree that the illegal conduct was discovered in March 2002, thus triggering SNTG's obligation to withdraw from its participation in the anticompetitive activity? The only date referenced in the agreement is January 15, 2003, the date it was signed. DOJ agreed not to prosecute SNTG for criminal activity which may have occurred prior to that date. Nowhere in the agreement is there a reference to March 2002 as the date SNTG discovered the illegal activity.

Griffin had, in an unrelated case, specified the discovery date in the agreement. He could have done so here. He did not.

DOJ, as author of the immunity agreement, bears the burden of precisely drafting it to reduce the chance of ambiguity and confusion. *Baird*, 218 F.3d at 229; *see also Aleman*, 286 F.3d at 90. Its inartful drafting cannot inure to its own benefit and to SNTG's detriment. We conclude that DOJ rescinded the agreement based on its own belief that SNTG had to have ceased its participation in the illegal activity in March 2002, a date that is not specified in the agreement.[10]

DOJ argues that when it sought protection under the amnesty program, SNTG represented that its participation in the anticompetitive activity had ceased as of March 2002, the date when O'Brien first reported that he suspected SNTG's involvement in the activity. Griffin conceded that Nannes had never represented that SNTG's participation in the anticompetitive activity ceased as of March 2002.

When an immunity agreement contains an integration clause expressly excluding any terms other than those set

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[10] A review of what transpired in the negotiations reveals that the date when SNTG ended its participation was never clearly established.

forth in the agreement, a party cannot rely on a purported implicit understanding in order to demonstrate that the government has breached the agreement. *In re Altro*, 180 F.3d 375-76. Likewise, DOJ, especially because it drafted the agreement, cannot depend upon a tacit understanding of what it contends was meant during negotiations but was not memorialized in the integrated agreement.

The agreement immunizes SNTG from prosecution for activity prior to January 15, 2003. Now DOJ contends the activity had to have stopped at an earlier unspecified date that is not set forth in the agreement. Had it wanted to fix the date sometime before January 15, 2003, it could have replaced the words "to the date of this letter" with the earlier date it now contends the parties contemplated.

VII.

When it entered into the agreement, DOJ never intended to prosecute SNTG. Its goals were to pursue SNTG's co-conspirators and to break up the conspiracy. It got what it had bargained for in the agreement. SNTG's partners in the conspiracy were prosecuted and convicted, and the conspiracy has been terminated. Now that it has received the benefit of the bargain, DOJ cannot prosecute the party that incriminated itself when it delivered the evidence DOJ used to accomplish its goals. Therefore, we shall enjoin DOJ from prosecuting SNTG and Wingfield[11] for the anticompetitive activity through January 15, 2003.

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[11] Although the reporting company's executives are protected by the immunity agreement, they have obligations separate and distinct from the company's obligations. Individuals protected by the agreement must produce any documentary evidence requested by DOJ and make themselves available for interview at the request of DOJ. During Nannes' investigation, Wingfield turned over his

personal journal entries and the four customer lists which evidenced a *per se* unlawful agreement between SNTG and its co-conspirators. Although Wingfield was available, DOJ did not request an interview with him. Thus, he is entitled to immunity.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

STOLT-NIELSEN S.A.,	:	**CIVIL ACTION**
STOLT-NIELSEN	:	
TRANSPORTATION GROUP LTD.,	:	
and RICHARD B. WINGFIELD	:	
	:	
v.	:	**NO. 04-CV-537**
	:	
UNITED STATES OF AMERICA	:	

ORDER

AND NOW, this 14th day of January, 2005, after an evidentiary hearing and upon consideration of the Findings of Fact (Document No. 57), as supplemented by the Memorandum, it is **ORDERED** that **JUDGMENT IS ENTERED** in favor of Stolt-Nielsen S.A., Stolt-Nielsen Transportation Group Ltd. and Richard B. Wingfield and against the United States of America.

IT IS FURTHER ORDERED that the United States of America is **ENJOINED** from indicting or prosecuting Stolt-Nielsen S.A., Stolt-Nielsen Transportation Group Ltd. and Richard B. Wingfield for any violations of the Sherman Act, 15 U.S.C. § 1, up to and including January 15, 2003, in the parcel tanker industry involving transportation to and from the United States.

/s/ Timothy J. Savage
TIMOTHY J. SAVAGE J.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

STOLT-NIELSEN S.A., STOLT-NIELSEN TRANSPORTATION GROUP LTD. and RICHARD B. WINGFIELD	:	**CIVIL ACTION**
v.	:	**NO. 04-CV-537**
UNITED STATES OF AMERICA	:	

FINDINGS OF FACT

AND NOW, this 14th day of January, 2005, after an evidentiary hearing held on April 13 and 14, 2004, at which it had the opportunity to observe the demeanor of the witnesses and to evaluate their credibility, the Court makes the following findings of fact:

1. Stolt-Nielsen Transportation Group Ltd. ("SNTG") is a division of Stolt-Nielsen S.A., a Luxembourg company. *SNTG Compl.* ¶ 5.

2. The United States Department of Justice ("DOJ") is charged with criminal enforcement of the United States antitrust laws.

3. Richard B. Wingfield ("Wingfield") is the former Managing Director of Tanker Trading for SNTG. *Wingfield Compl.* ¶ 8.

4. DOJ has the Corporate Leniency Program ("Amnesty Program") which encourages companies involved in ongoing antitrust conspiracies to report the activity and to cooperate in the investigation and prosecution of co-conspirators by

offering them and their officers, directors and employees immunity from criminal prosecution. *Scott D. Hammond, "When Calculating the Costs and Benefits of Applying for Corporate Amnesty, How Do You Put a Price Tag on an Individual's Freedom?," Fifteenth Annual National Institute on White Collar Crime (Mar. 8, 2001)* (SNTG's Pre-Hearing Brief, Ex. A).

5. The Amnesty Program was designed as an investigative tool to assist the Division in obtaining evidence to expose and prosecute members of a cartel or antitrust conspiracy. *Scott D. Hammond, "When Calculating the Costs and Benefits of Applying for Corporate Amnesty, How Do You Put a Price Tag on an Individual's Freedom?," Fifteenth Annual National Institute on White Collar Crime (Mar. 8, 2001),* at 2 (*Exhibits Presented by Stolt-Nielsen During April 13-14 Hearing,* Ex. 36 (Tab 29)).

6. Leniency under the Amnesty Program is only available to the first company to come forward. *Scott D. Hammond, When Calculating the Costs and Benefits of Applying for Corporate Amnesty, How Do You Put a Price Tag on an Individual's Freedom?," Fifteenth Annual National Institute on White Collar Crime (Mar. 8, 2001),* at 2 (*Exhibits Presented by Stolt-Nielsen During April 13-14 Hearing,* Ex. 36 (Tab 29)).

7. In order to apply for the Amnesty Program, a reporting company must first obtain a "marker" to hold its place in line until the company completes its internal investigation into the potential anticompetitive activity. Tr. 4/13/04 at 115-16.

8. SNTG provides worldwide transportation of bulk liquid chemicals, edible oils, acids and other specialty liquids through a network involving intercontinental parcel tankers, coastal parcel tankers, river parcel tankers, tank containers, and terminal and rail services. *SNTG Compl. ¶ 6.*

9. Parcel tanker ships are deep-sea vessels with climate controlled compartments designed to transport multiple liquids for multiple customers at a time. *SNTG Compl.* ¶ *6.*

10. Parcel tanker ship owners seek to ensure that the tankers are kept at full capacity and maintain a regular geographic rotation because an owner loses money when its ships are idle or empty. Tr. 4/13/04 at 109-10.

11. In the parcel tanker industry, one of the factors taken into consideration by a carrier in deciding to bid on a competitor's shipping lane is whether the carrier's successful bid on a competitors route will result in the competitor's ability to use the newly-created space on its vessels to compete for the carrier's own shipping lanes. Tr. 4/13/04 at 110-12, 126-28.

12. Taking into account the likely reactions of its competitors to a carrier's bidding on particular routes is a legal practice called conscious parallelism. Tr. 4/13/04 at 109-10, 154-55.

13. Competitors in the industry sometimes have legal joint ventures. Tr. 4/13/04 at 111, 128-29.

14. Odfjell Seachem AS ("Odfjell") and Jo Tankers B.V. ("Jo Tankers") are competitors of SNTG in the parcel tanker shipping industry. Tr. 4/13/04 at 155-58.

15. Beginning in August 1998 and continuing into 2002, SNTG had express agreements with Odfjell and Jo Tankers to allocate customers by not bidding on each other's selected shipping routes. Tr. 4/14/04 (a.m.) at 22-23.[1]

16. On November 22, 2002, John M. Nannes ("Nannes"), a former Deputy Assistant Attorney General in DOJ's Antitrust Division, then in private antitrust law

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[1] The transcript of the April 14, 2004, hearing, is divided into an "a.m." and "p.m." session.

practice, met with Samuel Cooperman ("Cooperman"), Chairman and CEO of SNTG, and other SNTG officials. Tr. 4/13/04 at 105-06, 124-25.

17. During the meeting, Nannes learned that SNTG's former in-house counsel, Paul O'Brien, had raised antitrust concerns in a memorandum to Cooperman in early 2002. Tr. 4/13/04 at 113, 129-30.

18. Nannes learned that the basis for O'Brien's concerns was an internal fax dated April 10, 2001, discussing SNTG's alternative strategies in competing with Odfjell. Tr. 4/14/04 (a.m.) at 106-07.

19. Nannes believed that the fax was evidence of conscious parallelism, not of a Sherman Act violation. Tr. 4/13/04 at 163-64.

20. Cooperman told Nannes that as a result of O'Brien's warning, SNTG had revised and expanded its internal antitrust compliance program. Tr. 4/13/04 at 130-31.

21. Nannes reviewed DOJ's Amnesty Program with Cooperman and the others. Tr. 4/13/04 at 131.

22. Cooperman admitted to Nannes that an internal investigation would yield information providing a sufficient basis to seek amnesty. Tr. 4/13/04 at 131-32.

23. At the conclusion of the November 22, 2002, meeting, Nannes did not have enough information to determine whether SNTG had engaged in criminal conduct. Tr. 4/13/04 at 133-34.

24. Cooperman authorized Nannes to contact DOJ about participating in the Amnesty Program. Tr. 4/13/04 at 131.

25. On November 24, 2002, Nannes contacted Deputy Assistant Attorney General James A. Griffin ("Griffin') to inquire whether DOJ had opened an investigation into the parcel tanker industry and whether DOJ had given a marker. Tr. 4/13/04 at 133-34, 199-200.

26. Griffin informed Nannes that DOJ's Philadelphia office had opened an investigation of possible illegal activity within the parcel tanker industry that same day. Tr. 4/13/04 at 199-200.

27. Former colleagues Nannes and Griffin exchanged a series of exploratory telephone calls during which they shared vague pieces of information about possible collusive activity in the industry. Tr. 4/13/04 at 133-35.

28. SNTG was not mentioned by name during these exploratory conversations. Tr. 4/13/04 at 133-34.

29. Nannes concluded from his conversations with Griffin that DOJ had not yet granted leniency to anyone in the parcel tanker industry. Tr. 4/13/04 at 138.

30. During one of the conversations, Griffin told Nannes that he knew of a company that fired a lawyer who had brought to its attention an antitrust violation. Tr. 4/13/04 at 136-37, 201-203.

31. Griffin advised Nannes that if his client was that company, it could be an impediment to the company's admission into the Amnesty Program. Tr. 4/13/04 at 137-38, 203-04.

32. O'Brien's employment with SNTG ended in March 2002. Tr. 4/13/04 at 129-30.

33. O'Brien later instituted a wrongful termination lawsuit against SNTG in Connecticut state court. *O'Brien v. Stolt-Nielsen Transp. Group Ltd., et at.*, No. 02-0190051-S (Conn. Super. Ct., filed June 18, 2002) (*Exhibits Presented by Stolt-Nielsen During April 13-14 Hearing,* Ex. 54 (Tab 47)).

34. Nannes arranged a meeting with DOJ to address and resolve Griffin's concern with O'Brien's termination. Tr. 4/13/04 at 138-39.

35. At the meeting with Griffin and other DOJ attorneys held on December 4, 2002, Nannes was warned that if

O'Brien had been fired for exposing actual antitrust violations, SNTG would not be eligible for the Amnesty Program. Tr. 4/13/04 at 203-05.

36. DOJ's investigation into the parcel tanker industry was precipitated by a *Wall Street Journal* article. Tr. 4/13/04 at 197-98.

37. Nannes explained to Griffin that because SNTG had heeded O'Brien's warnings by implementing remedial steps to enhance its internal antitrust compliance program, the circumstances of his departure from SNTG were irrelevant. Tr. 4/13/04 at 140-41; Tr. 4/14/04 (a.m.) at 36-37.

38. At the conclusion of the December 4 meeting, Griffin advised Nannes that SNTG would not be eligible for the Amnesty Program if the "evidence of withdrawal turned out to be . . . 'a head fake.'" Tr. 4/13/04 at 204.

39. Although he asserted during the meeting that SNTG had taken remedial steps to cease the activity in question, Nannes did not represent that SNTG's participation in the illegal activity ceased as of March 2002. Tr. 4/13/04 at 145-47; Tr. 4/14/04 (a.m.) 19-20, 75-76, 85-86, 92-94; Tr. 4/14/04 (p.m.) at 4-5.

40. As of December 4, 2002, Nannes still could not confirm whether SNTG had engaged in any illegal anticompetitive conduct. Tr. 4/13/04 at 146-47; Tr. 4/14/04 (a.m.) at 42, 87-88; Tr. 4/14/04 (p.m.) at 4-5.

41. After the meeting, DOJ conducted its own investigation before deciding whether to consider accepting SNTG into the Amnesty Program. Tr. 4/13/04 at 148-49.

42. On December 17, 2002, SNTG was given a "marker," establishing first place in line for the Amnesty Program. Tr. 4/13/04 at 149-50.

43. Upon receiving the marker, Nannes commenced his internal investigation. Tr. 4/13/04 at 152-54.

44. At DOJ's request to avoid leaks which might compromise the European Union's investigation into similar activity, Nannes kept the investigation confidential. Tr. 4/13/04 at 153; Tr. 4/14/04 (p.m.) at 31-32.

45. Nannes initially had difficulty discerning the differences between legal conscious parallelism and illegal anticompetitive conduct in SNTG's practices. Tr. 4/13/04 at 154-55.

46. During his internal investigation, Nannes met with Richard Wingfield who gave Nannes his personal journal entries and three customer lists which had been shared by SNTG and its co-conspirators. Tr. 4/13/04 at 155-61; Tr. 4/14/04 at 25-27 (a.m).

a. The list dated August 27, 1998, was a listing of SNTG's contracts arranged according to geographic trading lanes. Tr. 4/13/04 at 156-58; *Exhibits Presented by Stolt-Nielsen During April 13-14, 2004 Hearing*, Ex. 11.

b. The list dated August 31, 1998, was a partial list prepared by Odfjell of its customers. Tr. 4/13/04 at 156-58; *Exhibits Presented by Stolt-Nielsen During April 13-14, 2004 Hearing*, Ex. 10.

c. The list dated April 26, 2001, was a comprehensive list of both SNTG and Odfjell customers. Tr. 4/13/04 at 156-58; *Exhibits Presented by Stolt-Nielsen During April 13-14, 2004 Hearing*, Ex. 12.

47. Wingfield later supplied Nannes with a fourth list that proved that SNTG and its conspirators allocated customers. Tr. 4/13/04 at 159-62; *Exhibits Presented by Stolt-*Nielsen *During April 13-14, 2004 Hearing*, Ex. 13.

48. Nannes concluded that SNTG and its co-conspirators, by exchanging customer lists, had agreed to divide customers, an arrangement that constituted a *per se* unlawful agreement. Tr. 4/13/04 at 156-61.

49. Nannes wanted to expedite the official proffer so he could secure immunity for SNTG. Tr. 4/13/04 at 162, 164.

50. During the proffer on January 8, 2003, Nannes revealed that for several years SNTG had express agreements with its competitors to divide customers using allocation lists negotiated and agreed upon by the companies. Tr. 4/13/04 at 164-66.

51. At the proffer, no one represented and no one inquired when specifically the anticompetitive arrangement among SNTG and its conspirators had ceased. Tr. 4/13/04 at 170-71.

52. DOJ does not require that a proffer include the precise starting and ending dates of a reported conspiracy. Tr. 4/14/04 (p.m.) at 61.

53. In deciding whether to grant immunity, Griffin relied on Nannes' representation that O'Brien's complaint allegations were not true and Nannes' assertion that SNTG had in fact taken steps to strengthen its antitrust compliance policy. Tr. 4/13/04 at 207-08.

54. On January 14, 2003, Griffin sent Nannes DOJ's model corporate leniency letter. Tr. 4/13/04 at 172.

55. At Nannes' suggestion, the model letter was clarified to cover all SNTG subsidiaries, affiliates and former employees. Tr. 4/13/04 at 174-75.

56. The letter agreement was executed on January 15, 2003. Tr. 4/13/04 at 173.

57. In the letter, SNTG represented that it "took prompt and effective action to terminate its part in the anticompetitive activity being reported upon discovery of the activity," that it did not coerce any other party to participate in the activity, and was not the leader or originator of the activity. *SNTG Compl.*, Ex. 1 ¶ 1.

58. DOJ does not require that an amnesty applicant meet the formal legal requirements of withdrawal to satisfy the prompt and effective action requirement. Tr. 4/13/04 at 192-93.

59. The agreement does not define "prompt and effective."

60. The agreement does not specify a date of discovery. Tr. 4/13/04 at 209.

61. DOJ can specify and has specified in the past the date of discovery in the agreement. Tr. 4/14/04 (p.m.) at 14.

62. DOJ agreed not to prosecute SNTG for any act or offense in connection with the reported anticompetitive activity it may have committed prior to the date of the letter, January 15, 2003. *SNTG Compl.*, Ex. 1 ¶ 3.

63. The anticompetitive activity reported was the "possible collusion or other conduct violative of Section 1 of the Sherman Act" in the parcel tanker industry involving transportation to and from the United States. *SNTG Compl.*, Ex. 1 at 1, ¶ 1.

64. SNTG agreed to provide "full, continuing and complete cooperation" with respect to the facts relating to the activity; to provide all documents requested by DOJ; to secure the cooperation of its directors, officers and employees, including facilitating their appearing for interviews or testimony; to verify their completeness and truthfulness of the information provided by them; to take steps to insure that no one attempts to falsely protect or falsely implicate any person or entity; and to make restitution to any person or entity injured as a result of the activity in which SNTG participated. *SNTG Compl.*, Ex. 1 ¶ 2.

65. DOJ agreed to extend the immunity protection to any director, officer or employee who cooperated in DOJ's investigation. *SNTG Compl.*, Ex. 1 ¶ 4.

66. An employee's failure to cooperate is not imputed to SNTG because SNTG's corporate obligations are distinct from those of its individual current and former directors, officers and employees. Tr. 4/14/04 (a.m.) at 83; *SNTG Compl.*, Ex. 1 ¶ 4.

67. The agreement included a provision that DOJ reserved the right to declare the agreement void and to revoke the "conditional acceptance" of SNTG into the Amnesty Program if it determined SNTG had violated the agreement. *SNTG Compl.*, Ex. 1 ¶ 3.

68. In the event the agreement was revoked, DOJ could criminally prosecute SNTG and use any statements or information provided by SNTG against it. *SNTG Compl.*, Ex. 1 ¶ 3.

69. The agreement contains a standard integration clause, providing that the agreement supersedes any and all prior oral or written understandings which may have existed between the parties. *SNTG Compl.*, Ex. 1 ¶ 5.

70. After the execution of the agreement, SNTG turned over voluminous incriminating documents to DOJ and produced employees who revealed how the parcel tanker industry operated and how the customer lists were exchanged among the conspirators for the purpose of allocating customers and shipping lanes. Tr. 4/14/04 (a.m.) at 7-11.

71. DOJ did not request an interview with Wingfield. Tr. 4/14/04 (a.m.) at 14-15, 116.

72. In response to DOJ's requests, SNTG produced approximately 25,000 pages of documents to the Division. Tr. 4/14/03 (a.m.) at 15-18.

73. Using SNTG's information, DOJ charged Odfjell with participating in a conspiracy to allocate customers, fix prices and rig bids from August 1998 through November 2002. *United States v. Odfjell Seachem AS*, No. 03-CR-654 (E.D. Pa., Criminal Information, Sept. 29, 2003) (*Exhibits*

Presented by Stolt-Nielsen During April 13-14, 2004 Hearing, Ex. 22).

74. DOJ later charged Jo Tankers with participating in the same conspiracy to allocate customers, fix prices and rig bids from August 1998 through November 2002. *United States v. Jo Tankers, B.V.*, No. 04-CR-221 (E.D. Pa., Criminal Information, Apr. 19, 2004), *available at http:/www.usdojgov/atr/cases/f203500/203589.htm.*

75. Odfjell pled guilty and was fined $42.5 million. *Press Release, Department of Justice, Norwegian Shipping Co. and Two Executives Agree to Plead Guilty in International Parcel Tanker Shipping Investigation (Sept 29, 2003)*, at 1 (*Stolt-Nielsen's Proposed Findings of Fact*, Ex. 4).

76. Jo Tankers pled guilty and paid a fine of $19.5 million. *Press Release, Department of Justice, Dutch Shipping Company Agrees to Plead Guilty in International Parcel Tanker Shipping Investigation (Apr. 19, 2004),* at 1 *(Stolt-Nielsen's Proposed Findings* of *Fact,* Ex. 5).

77. DOJ prosecuted and obtained guilty pleas from several executives of Odfjell and Jo Tankers.

78. The chairman of Odfjell, Bjorn Sjaastad, was sentenced to four months imprisonment and fined $250,000. *United States v. Bjorn Sjaastad,* No. 03-CR-652 (E.D. Pa., Judgment Entered Oct. 22, 2003) (*Stolt-Nielsen's Proposed Findings of Fact*, Ex. 2). Odfjell Vice-President Eric Nilsen received three months prison sentence and was fined $25,000. *United States v. Erik Nilsen*, No. 03-CR-653 (E.D. Pa., Judgment Entered Oct. 22, 2003) *(Stolt-Nielsen's Proposed Findings of Fact*, Ex. 3). Hendrikus van Westenbrugge, a former co-managing director of Jo Tankers, was sentenced to three months imprisonment and fined $75,000.00. *United States v. Hendrikus van Westenbrugge*, No. 03-CR-806 (E.D.

Pa., Judgment ·ered Jan. 7, 2004) (*Stolt-Nielsen's Proposed Findin[illegible] Fact*, Ex. 1).

79. DOJ acknowledges that the prosecutions as a result of SNTG's cooperation were successful. Tr. 4/13/04 at 186.

80. On April 8, 2003, DOJ suspended SNTG's participation in the Amnesty Program because DOJ claimed that SNTG did not cease its part in the illegal activity in March 2002, but that the illegal activity continued until the second half of 2002. *Letter from Connolly* to *Nannes, Apr. 8, 2003* (*Exhibits Presented by Stolt-Nielsen During April 13-14, 2004 Hearing*, Ex. 21).

81. Neither Nannes nor anyone else represented that SNTGs participation in the illegal activity had ended in March 2002. Tr. 4/13/04 at 207; Tr. 4/14/04 (a.m.) at 19-20, 75-76, 85-86, 92-94.

82. The date "March 2002" does not appear in the agreement. Tr. 4/14/04 (p.m.) at 14.

83. The suspension letters suspended SNTG's voluntary document production but included a subpoena *duces tecum* for SNTG documents. *Letter from Connolly to Nannes, Apr. 8,* 2003 (*Exhibits Presented by Stolt-Nielsen During April 13-14, 2004 Hearing,* Ex. 21).

84. DOJ canceled a previously scheduled interview with an SNTG employee and recommended that SNTG employees obtain private counsel because they were now subject to criminal jeopardy. Tr. 4/14/04 (p.m.) at 36-38.

85. After April 8, 2003, DOJ conducted interviews of SNTG employees outside the presence of SNTG counsel and SNTG was not informed as to the status of DOJ's investigation. Tr. 4/14/04 (p.m.) at 36-38.

86. On June 24,2003, Wingfield was arrested and charged with having violated the Sherman Act, 15 U.S.C. § 1,

for his involvement in the conspiracy between March 2001 and October 2002. *SNTG Compl.*, Ex. 5.

87. On March 2, 2004, Griffin notified SNTG that DOJ was voiding the agreement and revoking amnesty because SNTG had falsely represented that "SNTG's in-house counsel learned of possible illegal activity by no later than February 2002 and, by March 2002, SNTG had taken prompt and effective action to terminate its part in the activity," and that in fact SNTG had continued its participation in the conspiracy until November 2002. *Letter from Griffin to Gidley, Mar. 2, 2004*, at 2 (*Exhibits Presented by Stolt -Nielsen During April 13-14, 2004 Hearing*, Ex. 43 (Tab 36)).

88. DOJ asserted that SNTG had failed to cooperate and meet its obligations under the agreement by falsely representing the true duration of its participation in the illegal activity and failing to fully disclose the involvement in the illegal activity of some of SNTG's senior executives. *Letter from Griffin to Gidley, Mar. 2, 2004*, at 2 (*Exhibits Presented by Stolt-Nielsen During April 13-14, 2004 Hearing*, Ex. 43 (Tab 36)).

89. DOJ has stated its intention to indict SNTG for its participation in the conspiracy. *Letter from Griffin to Gidley, Mar. 2, 2004*, at 3 (*Exhibits Presented by Stolt-Nielsen During April 13-14, 2004 Hearing*, Ex. 43 (Tab 36)).

/s/ Timothy J. Savage
TIMOTHY J. SAVAGE, J.

APPENDIX G

U.S. Department of Justice

Antitrust Division

Office of the Deputy Assistant Attorney General

950 Pennsylvania Ave., Suite 3214 Washington, DC 20530

John M. Nannes, Esq.
Skadden, Arps, Slate, Meagher & Flom LLP
1440 New York Ave., N.W.
Washington, D.C. 20005

Dear Mr. Nannes:

This letter sets forth the terms and conditions of an agreement between the Antitrust Division of the United States Department of Justice and Stolt-Nielsen Transportation Group Ltd. (Bermuda), its parent (including its ultimate parent), affiliates, and subsidiaries[1] [hereinafter SNTG] in connection with possible collusion or other conduct violative of Section 1 of the Sherman Act, 15 U.S.C. § 1, in the parcel tanker industry involving transportation to and from the United States. This agreement is conditional and depends upon SNTG satisfying the conditions set forth below. After all of these conditions are met, the Division will notify SNTG in writing that the application has been granted. It is further agreed that disclosures made by counsel for SNTG in furtherance of the amnesty application will not constitute a waiver of the attorney-client privilege or the work-product privilege.

[1] This agreement does not cover any joint venture partners SNTG may have or had in the parcel tanker industry.

AGREEMENT

1. **Representations:** SNTG desires to report to the Antitrust Division possible collusive activity or other conduct violative of the Sherman Act in the parcel tanker industry involving transportation to and from the United States ("the anticompetitive activity being reported"). SNTG represents to the Antitrust Division that, in connection with the anticompetitive activity being reported, it:

(a) took prompt and effective action to terminate its part in the anticompetitive activity being reported upon discovery of the activity; and

(b) did not coerce any other party to participate in the activity and was not the leader in, or the originator of, the anticompetitive activity being reported.

2. **Cooperation**: SNTG agrees to provide full, continuing and complete cooperation to the Antitrust Division in connection with the activity being reported, including, but not limited to, the following:

(a) providing a full exposition of all facts known to SNTG relating to the anticompetitive activity being reported;

(b) providing promptly, and without requirement of subpoena, all documents or other items in its possession, custody or control, wherever located, requested by the Antitrust Division, to the extent not already produced;

(c) using its best efforts to secure the ongoing, full and truthful cooperation of the current and former directors, officers and employees of SNTG, and encouraging such persons voluntarily to provide the Antitrust Division

with any information they may have relevant to the anticompetitive activity being reported;

(d) facilitating the ability of current and former directors, officers and employees to appear for such interviews or testimony in connection with the anticompetitive activity being reported as the Antitrust Division may require at the times and places designated by the Antitrust Division;

(e) using its best efforts to ensure that current and former directors, officers and employees who provide information to the Antitrust Division relevant to the anticompetitive activity being reported respond completely, candidly and truthfully to all questions asked in interviews and grand jury appearances and at trial;

(f) using its best efforts to ensure that current and former directors, officers and employees who provide information to the Antitrust Division relevant to the anticompetitive activity being reported make no attempt either falsely to protect or falsely to implicate any person or entity; and

(g) making all reasonable efforts, to the satisfaction of the Antitrust Division, to pay restitution to any person or entity injured as a result of the anticompetitive activity being reported, in which SNTG was a participant.

3. **Corporate Leniency**: Subject to verification of SNTG's representations in paragraph 1 above, and subject to its full, continuing and complete cooperation, as described in paragraph 2 above, the Antitrust Division agrees conditionally to accept SNTG into Part B of the Corporate Leniency Program, as explained in an Antitrust Division

policy statement dated August 10, 1993 (attached). Pursuant to that policy, the Antitrust Division agrees not to bring any criminal prosecution against SNTG for any act or offense it may have committed prior to the date of this letter in connection with the anticompetitive activity being reported. The commitments in this paragraph are binding only upon the Antitrust Division, although, upon request of SNTG, the Antitrust Division will bring this Agreement to the attention of other prosecuting offices or administrative agencies. If the Antitrust Division at any time determines that SNTG has violated this Agreement, this Agreement shall be void, and the Antitrust Division may revoke the conditional acceptance of SNTG into the Corporate Leniency Program. Should the Antitrust Division revoke the conditional acceptance of SNTG into the Corporate Leniency Program, the Antitrust Division may thereafter initiate a criminal prosecution against SNTG, without limitation. Should such a prosecution be initiated, any documents or other information provided by SNTG, as well as any statements or other information provided by any current or former director, officer or employee of SNTG to the Antitrust Division pursuant to this Agreement, may be used against SNTG in any such prosecution.

4. **Non-Prosecution Protection For Corporate Directors, Officers And Employees**: Subject to SNTG's full, continuing and complete cooperation, the Antitrust Division agrees that current and former[2] directors, officers and employees of SNTG who admit their knowledge of, or participation in, and fully and truthfully cooperate with the Antitrust Division in its investigation of the anticompetitive

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[2] The United States retains the right to decline to extend leniency coverage to any former employee who is, or has been an executive of a non-SNTG company engaged in the parcel tanker industry.

activity being reported, shall not be prosecuted criminally by the Antitrust Division for any act or offense committed prior to the date of this letter in connection with the anticompetitive activity being reported. Such full and truthful cooperation shall include, but not be limited to:

(a) producing in the United States all documents and records, including personal documents and records, and other materials requested by attorneys and agents of the United States;

(b) making himself or herself available for interviews in the United States upon the request of attorneys and agents of the United States;

(c) responding fully and truthfully to all inquiries of the United States in connection with the anticompetitive activity being reported, without falsely implicating any person or intentionally withholding any information;

(d) otherwise voluntarily providing the United States with any materials or information, not requested in (a) - (c) of this paragraph, that he or she may have relevant to the anticompetitive activity being reported; and

(e) when called upon to do so by the United States, testifying in trial and grand jury or other proceedings in the United States, fully, truthfully and under oath, subject to the penalties of perjury (18 U.S.C. § 1621), making false statements or declarations in grand jury or court proceedings (18 U.S.C. § 1623), contempt (18 U.S.C. §§ 401-402) and obstruction of justice (18 U.S.C. § 1503), in connection with the anticompetitive activity being reported.

The commitments in this paragraph are binding only upon the Antitrust Division, although, upon the request of SNTG, the Antitrust Division will bring this Agreement to the attention of other prosecuting offices or administrative agencies. In the event a current or former director, officer or employee of SNTG fails to comply fully with his/her obligations hereunder, this Agreement as it pertains to such individual shall be void, and any leniency, immunity or non-prosecution granted to such individual under this Agreement may be revoked by the Antitrust Division. Should any leniency, immunity or non-prosecution granted be revoked, the Antitrust Division may thereafter prosecute such person criminally, and any statements or other information provided by such person to the Antitrust Division pursuant to this Agreement may be used against him/her in such prosecution.

5. **Entire Agreement**: This letter constitutes the entire agreement between the Antitrust Division and SNTG, and supersedes all prior understandings, if any, whether oral or written, relating to the subject matter herein.

6. **Authority And Capacity**: The Antitrust Division and SNTG represent and warrant each to the other that the signatories to this Agreement on behalf of each party hereto have all the authority and capacity necessary to execute this Agreement and to bind the respective parties hereto.

The signatories below acknowledge acceptance of the foregoing terms and conditions.

Sincerely yours,

/s/ James M. Griffin
James M. Griffin
Deputy Assistant Attorney General
Antitrust Division

Date: /s/ 1/15/03

/s/ Reginald J.R. Lee
Reginald J.R. Lee
Chief Executive Officer
Stolt-Nielsen Transportation Group Ltd.

Date: January 15, 2003

/s/ John M. Nannes
John M. Nannes, Esq.
Counsel for Stolt-Nielsen Transportation Group Ltd.

Date: January 15, 2003

APPENDIX H

Department of Justice

CORPORATE LENIENCY POLICY

The Division has a policy of according leniency to corporations reporting their illegal antitrust activity at an early stage, if they meet certain conditions. "Leniency" means not charging such a firm criminally for the activity being reported. (The policy also is known as the corporate amnesty or corporate immunity policy.)

A. Leniency Before an Investigation Has Begun

Leniency will be granted to a corporation reporting illegal activity before an investigation has begun, if the following six conditions are met:

1. At the time the corporation comes forward to report the illegal activity, the Division has not received information about the illegal activity being reported from any other source;

2. The corporation, upon its discovery of the illegal activity being reported, took prompt and effective action to terminate its part in the activity;

3. The corporation reports the wrongdoing with candor and completeness and provides full, continuing and complete cooperation to the Division throughout the investigation;

4. The confession of wrongdoing is truly a corporate act, as opposed to isolated confessions of individual executives or officials;

5. Where possible, the corporation makes restitution to injured parties; and

6. The corporation did not coerce another party to participate in the illegal activity and clearly was not the leader in, or originator of, the activity.

B. **Alternative Requirements for Leniency**

If a corporation comes forward to report illegal antitrust activity and does not meet all six of the conditions set out in Part A, above, the corporation, whether it comes forward before or after an investigation has begun, will be granted leniency if the following seven conditions are met:

1. The corporation is the first one to come forward and qualify for leniency with respect to the illegal activity being reported;

2. The Division, at the time the corporation comes in, does not yet have evidence against the company that is likely to result in a sustainable conviction;

3. The corporation, upon its discovery of the illegal activity being reported, took prompt and effective action to terminate its part in the activity;

4. The corporation reports the wrongdoing with candor and completeness and provides full, continuing and complete cooperation that advances the Division in its investigation;

5. The confession of wrongdoing is truly a corporate act, as opposed to isolated confessions of individual executives or officials;

6. Where possible, the corporation makes restitution to injured parties; and

7. The Division determines that granting leniency would not be unfair to others, considering the nature of the illegal activity, the confessing corporation's role in it, and when the corporation comes forward.

In applying condition 7, the primary considerations will be how early the corporation comes forward and whether the corporation coerced another party to participate in the illegal activity or clearly was the leader in, or originator of, the activity. The burden of satisfying condition 7 will be low if the corporation comes forward before the Division has begun an investigation into the illegal activity. That burden will increase the closer the Division comes to having evidence that is likely to result in a sustainable conviction.

C. **Leniency for Corporate Directors, Officers, and Employees**

If a corporation qualifies for leniency under Part A, above, all directors, officers, and employees of the corporation who admit their involvement in the illegal antitrust activity as part of the corporate confession will receive leniency, in the form of not being charged criminally for the illegal activity, if they admit their wrongdoing with candor and completeness and continue to assist the Division throughout the investigation.

If a corporation does not qualify for leniency under Part A, above, the directors, officers, and employees who come forward with the corporation will be considered for immunity from criminal prosecution on the same basis as if they had approached the Division individually.

D. **Leniency Procedure**

If the staff that receives the request for leniency believes the corporation qualifies for and should be accorded leniency, it should forward a favorable recommendation to the Office

of Operations, setting forth the reasons why leniency should be granted. Staff should not delay making such a recommendation until a fact memo recommending prosecution of others is prepared.

The Director of Operations will review the request and forward it to the Assistant Attorney General for final decision. If the staff recommends against leniency, corporate counsel may wish to seek an appointment with the Director of Operations to make their views known. Counsel are not entitled to such a meeting as a matter of right, but the opportunity will generally be afforded.

Issued August 10, 1993

APPENDIX I

U.S. Department of Justice

Antitrust Division

Office of the Deputy Assistant Attorney General *950 Pennsylvania Ave., Suite 3736*
Washington, D.C. 20530

Model Corporate Conditional Leniency Letter (April 2, 2002)

[name and address]

Dear [name]:

This letter sets forth the terms and conditions of an agreement between the Antitrust Division of the United States Department of Justice and [ABC, Inc. ("[ABC]")], in connection with possible [insert description of conduct: e.g., price fixing, bid rigging, market allocation] or other conduct violative of Section 1 of the Sherman Act, 15 U.S.C. § 1, in the [insert generic description of industry: e.g., widget] industry [insert geographic scope—e.g., in the United States and elsewhere]. This agreement is conditional and depends upon [ABC], satisfying the conditions set forth below. After all of these conditions are met, the Division will notify [ABC] in writing that the application has been granted. It is further agreed that disclosures made by counsel for [ABC] in furtherance of the amnesty application will not constitute a waiver of the attorney-client privilege or the work-product privilege.

AGREEMENT

1. **Representations:** [ABC] desires to report to the Antitrust Division possible [e.g., price fixing] activity or other conduct violative of the Sherman Act in the [insert] industry [e.g., in the United States and elsewhere] ("the anticompetitive activity being reported"). [ABC] represents

to the Antitrust Division that, in connection with the anticompetitive activity being reported, it:

(a) took prompt and effective action to terminate its part in the anticompetitive activity being reported upon discovery of the activity; and

(b) did not coerce any other party to participate in the activity and was not the leader in, or the originator of, the anticompetitive activity being reported.

2. **Cooperation:** [ABC] agrees to provide full, continuing and complete cooperation to the Antitrust Division in connection with the activity being reported, including, but not limited to, the following:

(a) providing a full exposition of all facts known to [ABC] relating to the anticompetitive activity being reported;

(b) providing promptly, and with requirement of subpoena, all documents or other items in its possession, custody or control, wherever located, requested by the Antirust Division, to the extent not already produced;

(c) using its best efforts to secure the ongoing, full and truthful cooperation of the current [and former][1] directors, officers and employees of [ABC], and encouraging such persons voluntarily to provide the Antitrust Division with any

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[1] Former employees are not covered by the Leniency Policy, but may be included in the negotiated coverage of the agreement in appropriate cases. The decision on whether the Division includes former employees will depend on a number of factors, including whether the applicant company is interested in protecting its former employees and whether it has the ability to help to secure the cooperation of key former employees.

information they may have relevant to the anticompetitive activity being reported;

(d) facilitating the ability of current [and former] directors, officers and employees to appear for such interviews or testimony in connection with the anticompetitive activity being reported as the Antitrust Division may require at the times and places designated by the Antitrust Division;

(e) using its best efforts to ensure that current [and former] directors, officers and employees who provide information to the Antitrust Division relevant to the anticompetitive activity being reported respond completely, candidly and truthfully to all questions asked in interviews and grand jury appearances and at trial;

(f) using its best efforts to ensure that current [and former] directors, officers and employees who provide information to the Antitrust Division relevant to the anticompetitive activity being reported make no attempt either falsely to protect or falsely to implicate any person or entity; and

(g) making all reasonable efforts, to the satisfaction of the Antitrust Division, to pay restitution to any person or entity injured as a result of the anticompetitive activity being reported in which [ABC] was a participant.

3. **Corporate Leniency:** Subject to verification of [ABC]'s representations in paragraph 1 above, and subject to its full, continuing and complete cooperation, as described in paragraph 2 above, the Antitrust Division agrees conditionally to accept [ABC] into [Part A/Part B] of the Corporate Leniency Program, as explained in an Antitrust Division policy statement dated August 10, 1993 (attached). Pursuant to that policy, the Antitrust Division agrees not to

bring any criminal prosecution against [ABC] for any act or offense it may have committed prior to the date of this letter in connection with the anticompetitive activity being reported. The commitments in this paragraph are binding only upon the Antitrust Division, although, upon request of [ABC], the Antitrust Division will bring this Agreement to the attention of other prosecuting offices or administrative agencies. If the Antitrust Division at any time determines that [ABC] has violated this Agreement, this Agreement shall be void, and the Antitrust Division may revoke the conditional acceptance of [ABC] into the Corporate Leniency Program. Should the Antitrust Division revoke the conditional acceptance of [ABC] into the Corporate Leniency Program, the Antitrust Division may thereafter initiate a criminal prosecution against [ABC], without limitation. Should such a prosecution be initiated, any documentary or other information provided by [ABC], as well as any statements or other information provided by any current [or former] director, officer or employee of [ABC] to the Antitrust Division pursuant to this Agreement, may be used against [ABC] in any such prosecution.

4. **Non-Prosecution Protection For Corporate Directors, Officers And Employees:** Subject to [ABC]'s full, continuing and complete cooperation, the Antitrust Division agrees that current [and former] directors, officers and employees of [ABC] who admit their knowledge of, or participation in, and fully and truthfully cooperate with the Antitrust Division in its investigation of the anticompetitive activity being reported, shall not be prosecuted criminally by the Antitrust Division for any act or offense committed [during their period of employment at [ABC]] prior to the date of this letter in connection with the anticompetitive activity being reported. Such full and truthful cooperation shall include, but not be limited to:

(a) producing in the United States all documents and records, including personal documents and

records, and other materials requested by attorneys and agents of the United States;

(b) making himself or herself available for interviews in the United States upon the request of attorneys and agents of the United States;

(c) responding fully and truthfully to all inquires of the United States in connection with the anticompetitive activity being reported, without falsely implicating any person or intentionally withholding any information;

(d) otherwise voluntarily providing the United States with any materials or information, not requested in (a) – (c) of this paragraph, that he or she may have relevant to the anticompetitive activity being reported; and

(e) when called upon to do so by the United States, testifying in trial and grand jury or other proceedings in the United States, fully, truthfully and under oath, subject to the penalties of perjury (18 U.S.C. § 1621), making false statements or declarations in grand jury or court proceedings (18 U.S.C. § 1623), contempt (18 U.S.C. §§ 401-402) and obstruction of justice (18 U.S.C. § 1503), in connection with the anticompetitive activity being reported.

The commitments in this paragraph are binding only upon the Antitrust Division, although, upon the request of [ABC], the Antitrust Division will bring this Agreement to the attention of other prosecuting offices or administrative agencies. In the event a current [or former] director, officer or employee of [ABC] fails to comply fully with his/her obligations hereunder, this Agreement as it pertains to such individual shall be void, and any leniency, immunity or non-prosecution granted to such individual under this Agreement may be

revoked by the Antitrust Division. Should any leniency, immunity or non-prosecution granted be revoked, the Antitrust Division may thereafter prosecute such person criminally, and any statements or other information provided by such person to the Antitrust Division pursuant to this Agreement may be used against him/her in such prosecution.

5. **Entire Agreement:** This letter constitutes the entire agreement between the Antitrust Division and [ABC], and supersedes all prior understandings, if any, whether oral or written, relating to the subject matter herein.

6. **Authority And Capacity:** The Antitrust Division and [ABC] represent and warrant each to the other that the signatories to this Agreement on behalf of each party hereto have all the authority and capacity necessary to execute this Agreement and to bind the respective parties hereto.

The signatories below acknowledge acceptance of the foregoing terms and conditions.

Sincerely yours,

Date: _____

James M. Griffin
Deputy Assistant
Attorney General
Antitrust Division

_____ Date: _____

[Name]
[Position]
[ABC, Inc.]

_____ Date: _____

[Name]
Counsel for [ABC, Inc.]

APPENDIX J

GRAND JURY MANUAL

- **Introduction**
- **Chapter 1 - Getting Started**
- **Chapter 2 - The Requirement of Secrecy -- Rule 6(e)**
- **Chapter 3, Part I - Subpoenas**
- **Chapter 3, Part II - Subpoenas**
- **Chapter 4 - Presenting Evidence to the Grand Jury**
- **Chapter 5 - Immunity**
- **Chapter 6 - Multiple Representation/Conflicts of Interest**
- **Chapter 7 - Indictment and Information**
- **Chapter 8 - Perjury and Obstruction of Justice**
- **Chapter 9 - Plea Agreements**

[EXCERPTS]

Introduction

This new edition of the Antitrust Division Grand Jury Practice Manual was prepared to aid all Division personnel in the performance of their grand jury related responsibilities. It is designed to be a single updated source for general legal, policy and procedural guidance relevant to such responsibilities. Although a certain amount of detail is provided concerning the various criminal laws the Division enforces, this Manual is intended to be a guide to grand jury practice and not a comprehensive primer on criminal law enforcement. This Manual is intended to be as current as possible, however, Division professionals should be alert to changes in substantive law and Division procedures that may not be contained in this Manual.

This version of the Grand Jury Manual is a complete revision of the old Manual which should now be discarded. It should be used in conjunction with the Antitrust Division Manual which also provides valuable guidance in the criminal law enforcement area.

This manual provides only internal Department of Justice guidance. It is not intended to, does not, and may not be relied upon to create any rights, substantive or procedural, enforceable at law by any party in any matter civil or criminal. No limitations are hereby placed on otherwise lawful investigative and litigative prerogatives of the Department of Justice.

Numerous attorneys, paralegals and secretaries throughout the Antitrust Division, including all the employees in the FOIA Unit, contributed to this edition of the Manual. Without their effort, performed in addition to their already heavy work-loads, this revision could not have been produced. We all owe a debt of thanks to them.

Several individuals, in addition, deserve special recognition for their contribution to this edition -- Elaine

Fidler, proofed (and reproofed) this Manual and managed various other aspects of its production; Jacqueline Jones, who typed (and retyped) the majority of the Manual; Kate Schlech, who offered her sage comments on all the chapters of the Manual; John Powers, who reviewed the legal analysis throughout the Manual and was always there to offer advice and guidance; and especially Leo Neshkes, who took responsibility for this revision when it was faltering and without whom this edition of the Manual would never have been produced.

J. Corporate "Amnesty"

The Division has a policy of giving serious consideration to according lenient treatment to corporations voluntarily reporting their illegal activity prior to our detection of it. "Lenient treatment" means not indicting such a firm. (The policy is known variously as the corporate amnesty, immunity or leniency policy.)

There are several factors that are weighed in arriving at the decision to grant leniency. First, only the first corporation to come forward will be considered for leniency. If other corporations involved in the same conspiracy subsequently come in to confess wrongdoing, or if all of the involved corporations come forward as a group, they cannot be given the same consideration. Their cooperation can be given some weight, of course, at the sentencing stage.

Second, in order to redound to the benefit of the corporation, the voluntary confession of wrongdoing must be truly a corporate act, as opposed to the confessions of individual executives or officials. If individual executives cooperate with the Government in the same manner as the corporation, they may also be given serious consideration for immunity.

Other factors that must bear on any decision regarding leniency include the following:

1. whether the Division could have reasonably expected that it would have become aware of the conspiracy in the near future if the corporation had not reported it;

2. whether the corporation, on discovery of the illegal activity previously unknown to it, took prompt and effective action to terminate its part in the conspiracy;

3. the candor and completeness with which the corporation reports the wrongdoing and continues to assist the Division throughout the investigation;

4. the nature of the violation and the confessing party's role in it, e.g., was the corporation's conduct coercive toward its co-conspirators, was it the originating party, and did it have actual exclusionary effects on others in the marketplace; and

5. whether the corporation has made, or stated its intention to make, restitution to injured parties.

If the attorney who receives the request for amnesty believes the corporation qualifies for, and should be accorded lenient treatment, he should forward a favorable recommendation to the Office of Operations, setting forth the reasons why leniency should be granted. Staff should not delay making such a recommendation until a fact memo recommending prosecution of others is prepared. The Director of Operations will review the request, and forward it to the Assistant Attorney General for final decision. If the staff attorney recommends against lenient treatment, corporate counsel may wish to seek an appointment with the Director of Operations to make his views known. Counsel are not entitled to such a meeting as a matter of right, but the opportunity will generally be afforded.

APPENDIX K

ANTITRUST ENFORCEMENT, SOME INITIAL THOUGHTS AND ACTIONS

Address by

ANNE K. BINGAMAN
Assistant Attorney General
Antitrust Division
U.S. Department of Justice

Before the
Antitrust Section of the
American Bar Association

Loews Hotel
New York, New York

August 10, 1993

[EXCERPTS]

The other change in Antitrust Division policy that I want to discuss entails an expansion of our Corporate Amnesty Policy. That policy was initiated in October, 1978. Under it, the Division will consider not seeking indictment of corporations that confess to violation of the antitrust laws prior to the initiation of an investigation by the Division. Confessing officers and employees receive the same consideration for amnesty. The grant of amnesty, however, is not automatic. The Division exercises its prosecutorial discretion on the issue in accord with a seven-factor test. Under the test, amnesty is available only to those who come forward before our investigation began.

On-reflection, it seems to me that some form of Corporate Amnesty Policy makes good sense. Under various criteria, prosecutors traditionally have been willing to accord lenient treatment to those who provide valuable cooperation. They have done so because such cooperation can increase significantly the likelihood of discovering and punishing illegal conduct. It also allows a more efficient use of the government's limited resources. The benefit of an amnesty policy, moreover, extends beyond the cases in which it is employed. To the extent that the existence of the policy is viewed by potential conspirators as raising the risk of detection and punishment, it also may deter other anti-competitive agreements.

The Corporate Amnesty Policy has been somewhat successful. A number of corporations have come forward. But, I think there is a potential to improve its efficacy. It has seemed to me that our policy of refusing to offer amnesty to anyone once an investigation has begun is too rigid; it may be depriving the Division of additional cooperation that would on balance serve the public interest. We also have concluded that counsels' current inability to guarantee amnesty to their clients if certain criteria are satisfied may be reducing the efficacy of the program. Therefore, we have decided to

change the Policy in several respects. If parties come forward before our investigation begins and satisfy six criteria, they will receive amnesty. That much greater certainty is provided. The six criteria are:

(1) at the time the corporation comes forward, the Division has not received information about the activity from any other source;

(2) the corporation, on discovery of the illegal conduct, must take prompt and effective action to terminate its participation in the illegal activity;

(3) the corporation must report the wrongdoing with candor and completeness and provide full, continuing and complete cooperation throughout the subsequent investigation;

(4) the confession must truly represent a corporate act, as opposed to isolated confessions of individual employees acting on their own;

(5) where possible, the corporation must make restitution to injured parties; and

(6) the corporation must not have coerced another party to participate in the illegal activity and must not have been the leader in, or originator of, the misconduct.

If a corporation comes forward after our investigation begins, for the first time, under the policy announced today, it still may quality for amnesty, in the Department's discretion. To be sure, the fact that a corporation does not come forward until after an investigation has been initiated may raise some questions as to its eligibility under some of the other factors. If, however, a potential defendant is in a position to offer the government important and valuable cooperation, it is not apparent to me why the Division should refuse even to consider amnesty simply because an investigation has been instituted. We, of course, do not want to dilute the incentives

to come forward before the initiation of our investigation. However, at a time when all government agencies are being asked to increase their productivity, I think that it is reasonable to expand the Division's Corporate Amnesty Policy in the manner indicated.

If a corporation qualifies for the guaranteed amnesty, individuals who come forward with it also will receive amnesty. Where the corporation does not qualify for guaranteed amnesty, the individuals will be considered for immunity as if they had approached the Division individually.

Let me make it clear that I view conduct that is sufficiently anti-competitive to merit criminal prosecution to be very serious business. More importantly, Congress has made it clear that it believes that criminal antitrust conduct is very harmful to consumers. It has sought to deter such conduct by repeatedly increasing the permissible financial and prison sanctions for antitrust violators. We hope that the expansion of our Corporate Amnesty Policy both will produce greater cooperation with our investigations and deter anti-competitive activity in general. Whatever the result, we shall continue to look for ways to enhance the effectiveness of the Division's law enforcement efforts.

* * * *

In closing, I want to reiterate my enthusiasm at the opportunity to lead the Antitrust Division. This is one of the most exciting and challenging jobs in this country, and I am privileged to hold it. The Antitrust Section of the American Bar Association has for many years played an important role in the public-private dialogue that has accompanied the development of contemporary antitrust policy. I hope that you continue that tradition. Many of you already have been most generous to me in the time you have taken to advise me about the opportunities and potential pitfalls of my new job, and for that I am most grateful. I am open to your

suggestions and thoughts, and I earnestly seek your help, as we together embark upon the task of reinvigorating and reshaping antitrust policy to foster competition and innovation at the brink of the Twenty-first Century.

APPENDIX L

DEPARTMENT OF JUSTICE

CHANGE AND CONTINUITY IN ANTITRUST ENFORCEMENT

Address by

ANNE K. BINGAMAN
Assistant Attorney General
Antitrust Division
U.S. Department of Justice

Before the
Fordham Corporate Law Institute

Fordham Law School
New York, New York

October 21, 1993

[EXCERPTS]

Now that I have discussed our priorities, let me bring you up to date on what we have done. At the ABA meeting in August in New York City, I announced two other initiatives -- the rescission of the Department's Vertical Restraints Guidelines and the expansion of the Antitrust Division's Corporate Leniency Policy.

The rescinded Vertical Restraints Guidelines, promulgated in 1985, were controversial from the outset. They were criticized by Congress and the National Association of Attorneys General. Those Guidelines were based on a premise that "vertical restraints that only affect intrabrand competition generally represent little anticompetitive threat and involve some form of economic integration between different levels of production or distribution that tend to create efficiencies." Consequently, the Guidelines sought to legitimize all but the most harmful intrabrand restraints. While the analytical methodology utilized in those Guidelines may provide insight into the competitive efforts of particular vertical restraints, in my opinion they unduly evaluated theory over factual analysis, and in certain respects were at variance with existing case law.

The rescinded Guidelines seemed particularly to be at variance with existing case law to the extent that they treated all agreements between distributors of a single manufacturer as vertical rather than horizontal agreements,[1] and treated vertical price fixing agreements under a rule of reason analysis if they were ancillary to non-price agreements.[2] To the extent that these conclusions were part of a broader effort by the Department of Justice during the 1980's to persuade the Supreme Court to reverse its decisions holding vertical

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[1] ¶¶2.1, 22.

[2] ¶2.3.

price fixing per se illegal,[3] we will not pursue that effort. Henceforth, the Antitrust Division will treat vertical price fixing as per se illegal, and non-price fixing restraints as subject to a meaningful rule of reason analysis.

Let me quickly note a caveat. I am not "declaring war" on all vertical restraints. I and others at the Division are cognizant of the potential procompetitive effects of some vertical non-price restraints in a variety of circumstances. Nor do I wish to ignore the insights provided by scholars over the past 25 years. If we are to continue as one of the foremost national economies, we must observe the Supreme Court's admonition that our focus be on promoting competition, not just the prerogatives of individual competitors. We will, however, look at vertical restraints in a more balanced manner than was reflected in the rescinded Vertical Guidelines.

The second initiative involves the expansion of the Division's Corporate Leniency Policy. Under the Division's previous Corporate Leniency Policy, the Division would consider not seeking indictment of corporations that confessed to violations of the antitrust laws prior to the Division's initiation of an investigation. The grant of amnesty was not automatic. The Division exercised its prosecutorial discretion in accord with a seven factor test. Under that test, amnesty was available only to those who came forward before our investigation began.

The Corporate Leniency Policy had been somewhat successful. A number of corporations came forward. But, I thought that there was a potential to improve its efficacy. It seemed to me that our policy of refusing to offer amnesty to

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[3]See amicus brief of U.S. Department of Justice filed in Monsanto Co. v. Spray-Rite Service Corp., 465 U.S. 752 (1984).

anyone once an investigation had begun was too rigid; it may have deprived the Division of additional cooperation that, on balance, would have served the public interest. We also concluded that counsel's inability to guarantee amnesty to its clients if certain criteria were satisfied may have limited the efficacy of the program. Therefore, we have decided to change the Policy in several respects. Now, if parties come forward before our investigation begins and satisfy six criteria, they will receive amnesty. That much greater certainty is provided. The six criteria are:

(1) at the time the corporation comes forward, the Division has not received information about the activity from any other source;

(2) the corporation, on discovery of the illegal conduct, must take prompt and effective action to terminate its participation in the illegal activity;

(3) the corporation must report the wrongdoing with candor and completeness and provide full, continuing and complete cooperation throughout the subsequent investigation;

(4) the confession must truly represent a corporate act, as opposed to isolated confessions of individual employees acting on their own;

(5) where possible, the corporation must make restitution to injured parties; and

(6) the corporation must not have coerced another party to participate in the illegal activity and must not have been the leader in, or originator of, the misconduct.

If a corporation comes forward after our investigation begins, it still may qualify for amnesty, in the Department's discretion. The fact that a corporation does not come forward until after an investigation has been initiated may raise some

questions as to its eligibility under some of the other factors. If, however, a potential defendant is in a position to offer the government important and valuable cooperation, it is not apparent to me why the Division should refuse even to consider amnesty simply because an investigation has been instituted. Of course, we do not want to dilute the incentives to come forward before the initiation of our investigation. However, at a time when all government agencies are being asked to increase their productivity, I think that it is reasonable to expand the Division's Corporate Leniency Policy in the manner indicated.

Today's discussion of new priorities and our new initiatives should not obscure the fact that certain aspects of the Division's activities have been very successful over the years and continue to enjoy broad bi-partisan support.

APPENDIX M

DEPARTMENT OF JUSTICE

THE 3RD NORDIC COMPETITION POLICY CONFERENCE

FIGHTING CARTELS - WHY AND HOW?

LESSONS COMMON TO DETECTING AND DETERRING CARTEL ACTIVITY

By

Scott D. Hammond
Director Of Criminal Enforcement
U.S. Department of Justice
Antitrust Division

Presented at

Modern Museum
Stockholm, Sweden

September 12, 2000

LESSONS COMMON TO DETECTING AND DETERRING CARTEL ACTIVITY

I. Introduction

It is a pleasure to be here and to share with you the United States' experiences in detecting and deterring cartel activity. In discussing these two topics -- detection and deterrence -- I will focus on our experience with our Corporate Leniency Program, or as it is also known, the Corporate Amnesty Program ("Amnesty Program"). The Amnesty Program has been largely responsible for uncovering the majority of the large international cartels that we have recently prosecuted. Its success has already led a number of countries -- such as Canada, the United Kingdom, Germany, and France -- as well as the European Union to develop their own programs with still other countries considering whether to follow. From our perspective, the Amnesty Program is unquestionably the most important investigative tool available for detecting and cracking cartel activity. The success of the Amnesty Program also provides an appropriate lesson on deterrence, the second topic on the agenda. That is because the bedrock principles that apply to effectively *preventing* cartels are also at the core of implementing a successful amnesty program for *detecting* cartel activity once it does occur.

I will focus today on three hallmarks for both a successful Amnesty Program and an enforcement program that deters cartel activity. First, one's antitrust laws must provide the threat of stiff sanctions for those who participate in hardcore cartel activity. Second, antitrust authorities must cultivate a law enforcement environment in which business executives perceive a significant risk of detection by antitrust authorities if they either enter into, or continue to engage in, cartel activity. Third, antitrust authorities must provide transparency, to the greatest extent possible, throughout the anti-cartel enforcement program so that prospective cooperating parties can predict with a high degree of certainty

their treatment following cooperation. These three major cornerstones -- stiff potential penalties, heightened fear of detection, and transparency in enforcement policies -- are at the heart of both our Amnesty Program and our deterrence efforts.

II. The Corporate Amnesty Program

Before I address these three principles, I need to share with you some background information on how the Amnesty Program was developed and how it works in order to put its impact into perspective. The original version of our Amnesty Program actually dates back to 1978. Under that program, violators who came forward and reported their illegal activity before an investigation was underway were *eligible* to receive a complete pass from criminal prosecution. The grant of amnesty, however, was not automatic and the Division retained a great deal of prosecutorial discretion in the decision making process. Unfortunately, for reasons that I will discuss in more detail a little later, it became clear over time that this program was flawed. It resulted in relatively few amnesty applications and did not lead to the detection of a single international cartel.

In 1993, the Antitrust Division dramatically expanded its Amnesty Program to increase the opportunities and raise the incentives for companies to report criminal activity and cooperate with the Division. The Amnesty Program was revised in three major respects. First, the policy was changed to ensure that amnesty is *automatic* if there is no pre-existing investigation. That is, if a corporation comes forward prior to an investigation and meets the program's requirements, the grant of amnesty is certain and is not subject to the exercise of prosecutorial discretion. Second, the Division created an alternative amnesty, whereby amnesty is available even if cooperation begins *after* an investigation is underway. Third, if a corporation qualifies for automatic amnesty, then all directors, officers, and employees who come forward with the

corporation and agree to cooperate also receive automatic amnesty. (See attached Corporate Leniency Policy). One aspect of the program that did not change is that amnesty applies only to criminal sanctions, and firms accepted into the Amnesty program are required, where possible, to make full restitution to their victims in the United States.

Because of the novelty and uniqueness of this policy, it took some time before the private bar and business community gained confidence in the program. However, over the last five years, the results have been staggering. There has been more than a ten-fold increase in amnesty applications during this time frame. Moreover, in the last two years alone, cooperation from amnesty applications have resulted in scores of convictions and well over $1 billion in fines. More than anything else, the expansion of the Amnesty Program has been responsible for the success that we have had in cracking international cartels.

III. The Threat Of Severe Sanctions

Treating Cartel Activity As A Crime. With that background, I want to address the first element common to both deterring cartel activity and creating a successful Amnesty Program and that is the threat of severe sanctions for violators. In the United States, hardcore cartel activity -- such as price-fixing, bid-rigging, and customer and market allocation agreements -- is a felony violation of our criminal laws, and both corporations and individuals may be held liable. Corporations risk heavy criminal fines with the maximum potential fine being the greatest of $10 million, twice the gross gain to the cartel, or twice the gross loss suffered by the victims of the conspiracy. The maximum sentence for individuals is three years imprisonment and a fine which is the greatest of $350,000, twice the gross gain to the cartel, or twice the gross loss suffered by the victims of the conspiracy.

Of course, the United States is in the minority, albeit a growing one, in treating hardcore cartel activity as a crime and prosecuting offending corporations and individuals as criminals. I will not take this opportunity to explore all of the arguments in favor of prosecuting cartel activity criminally except to make the following point relevant to the discussion on deterrence. Based on our experience, there is no greater deterrent to the commission of cartel activity than the risk of imprisonment for corporate officials. Corporate fines alone are simply not sufficient to deter many would-be offenders. For example, in some cartels, such as the graphite electrode cartel, individuals personally pocketed millions of dollars as a direct result of their criminal activity. A corporate fine alone, no matter how punitive, is unlikely to deter such individuals.

The Perceived Risks Must Outweigh The Potential Rewards. While there is no current consensus as to whether cartels should be prosecuted criminally, there should be no dispute that cartel activity will not be deterred if the potential penalties are perceived by firms and their executives as outweighed by the potential rewards. If the potential sentences are not sufficiently punitive, then the potential sanctions will merely be seen as a cost of doing business. Just as the loss of one's liberty will certainly not be viewed in this manner, a heavy corporate fine may also send a powerful deterrent message. To this end, we have recently "upped the ante" by obtaining record-breaking fines against firms who engage in cartel activity. At the time the Amnesty Program was revised in 1993, the highest antitrust fine ever obtained in the United States was less than $3 million. Today, fines of $10 million or more have become almost commonplace with more than 30 imposed in the last five years. In fact, the Division has obtained fines of $100 million or more against five corporate defendants, including a $500 million fine against F. Hoffmann-La Roche (HLR) for its participation in the worldwide vitamin cartel. This dramatic leap in the level of criminal fines, however, is more than just a reflection of

our aggressive approach for detecting cartel activity. Rather, because fines in the United States are based in large part on a company's sales in the United States affected by the conspiracy, the record fine levels demonstrate the mammoth size of the international cartels that we have been uncovering, largely through the amnesty program; cartels that simply dwarf the domestic conspiracies that we have previously encountered.

The prosecution of HLR in the vitamin investigation also offers some sobering insight as to the risks companies are willing to take in order to profit from cartel activity and to how inadequate fines may be to ensure specific, let alone, general deterrence. In 1997, two years before HLR's participation in the vitamin conspiracy was exposed, HLR was investigated and convicted of participating in a separate international cartel in the citric acid industry. The firm entered into a plea agreement, agreed to cooperate, and was ordered to pay a $14 million fine -- which at the time was the third largest antitrust fine ever obtained in the United States. As part of its cooperation, HLR was told of the Division's then-covert investigation into the vitamin industry and offered the opportunity to cooperate. The Division interviewed two top executives from HLR who participated in the citric acid conspiracy and who also had dual responsibilities in HLR's vitamin business. HLR and its top executives denied to investigators any knowledge of, or participation in, a vitamin cartel. Of course, we would later learn that HLR had, in fact, engaged in a decade-long, worldwide vitamin cartel, and continued to lead that cartel even after it pled guilty in the citric acid investigation and learned that its vitamin business was under investigation. Instead of being deterred, top-level HLR executives orchestrated false statements to enforcement authorities, took steps to further conceal the firm's illegal activities, and continued to lead the world's other producers in a global cartel. This decision will end up costing HLR well over a

billion dollars in criminal fines and civil settlements. In addition, three European executives from HLR, including the two executives who blew their opportunity to come clean in the citric acid investigation, served time in U.S. prisons for their participation in the vitamin conspiracy. Clearly, the $14 million fine in the citric acid prosecution was not nearly enough to deter HLR or its top executives from continuing to participate in the vitamin cartel. Time will tell if the $500 million fine and jail sentences for the HLR executives will.

Corporate Amnesty Can Mean Zero Fines and No Jail. Of course, the Amnesty Program offers companies and their executives an alternative to these potentially harsh sentences. If a company detects an antitrust violation before we do, it has to chose whether to report the violation and seek leniency or to remain silent and hope for the best. When we revised our Amnesty Program, we sweetened the carrot by increasing the opportunities and incentives for companies to self report and cooperate. At the same time, our recent record of successful prosecutions and heavy sentences has sharpened the stick for companies who risk the alternative path.

The question is often raised as to whether an Amnesty Program will work in a jurisdiction where there is no individual liability and, therefore, no possibility of incarceration for culpable executives. Clearly, the opportunity to avoid imprisonment for corporate officials is a major inducement for firms to seek amnesty. However, in my opinion, an Amnesty Program can still succeed if the threat of heavy fines is significant enough. This belief is supported by our experience with foreign-based firms who have sought and obtained amnesty in international cases at a rate almost equal to their domestic counterparts. For example, the worldwide vitamin cartel was cracked by the cooperation provided by

French-based Rhône-Poulenc SA.[1] The company made the decision to come forward even though the culpable French executives resided outside of the United States and our extradition treaty with France does not cover antitrust offenses. So, the opportunity to avoid incarceration for its culpable executives was probably not the major inducement to Rhône-Poulenc's decision to come forward, but rather the desire to avoid a criminal conviction and heavy fine for the corporation. And, indeed, while Rhône-Poulenc paid zero dollars in fines, its principal co-conspirators, HLR and BASF, paid fines of $500 million and $225 million, respectively.

IV. Fear Of Detection

Building A Strong Enforcement Record. Of course, if firms perceive the risk of being caught by antitrust authorities as very small, then stiff maximum penalties will not be sufficient to deter cartel activity. Likewise, if cartel members do not fear detection, they will not be inclined to report their wrongdoing to authorities in exchange for leniency. Therefore, antitrust authorities must cultivate a law enforcement environment in which business executives perceive a significant risk of detection by antitrust authorities if they either enter into, or continue to engage in, cartel activity.

For example, think back to the tapes of the lysine cartel meetings that you watched yesterday. At the time of these meetings, there had been virtually no international cartel

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[1] The Division has a policy of treating the identity of amnesty applicants as a confidential matter, much like the treatment afforded to confidential informants. However, confidentiality is not required in this case with respect to Rhône-Poulenc's amnesty status, because the company has already issued a press release announcing its acceptance into the Amnesty Program.

prosecutions in the United States, and the revised Amnesty Program was in its infancy. The cartel members took precautions like setting up bogus trade association meetings, creating false documents, and staggering their arrival times at meetings in order to conceal their scheme. It was plain, however, that the cartel members did not fear detection by U.S. or foreign antitrust authorities. In fact, they literally laughed at the very idea of it.

Well, times have changed. In 1993, when the lysine investigation was underway, there were only a handful of Division investigations of alleged international cartel activity. By comparison, the Division currently has roughly *30* grand juries investigating suspected international cartel activity. Similarly, at the time of the lysine investigation, less than 2 percent of our corporate defendants were foreign-based, as compared to nearly 50 percent of our corporate defendants last year. These investigations are uncovering massive cartels and leading to record fines. For example, in the 10 years prior to 1993, the Division obtained, on average, less than *$30 million* in criminal fines annually. The Division's total fines imposed over the last three fiscal years increased from $205 million in FY 1997, to $267 million in FY 1998, to $1.1 billion in FY 1999. Well over 95 percent of these fines were imposed in connection with investigations of international cartel activity.

The Race To The Courthouse. So, have the $100 million-plus fines had a deterrent effect by either stifling the formation of cartels or disbanding them if they already exist? There is no way to quantify the number of cartels that are deterred before they are ever formed, but we are witnessing how our enforcement efforts are influencing cartels that already exist. To put it plainly, cartel members are starting to sweat, and the Amnesty Program feeds off that panic.

The more anxious a company is that its cartel participation may be discovered by the government, the more

likely it is to report its wrongdoing in exchange for amnesty. The promise of zero dollars in fines and immunity for culpable executives looms large. Of course, amnesty is only available to the first one in the door. If you are second, even if only by a matter of a few hours, which has happened on a number of occasions, the second firm and all of its culpable executives will be subject to full prosecution.

The "winner-take-all" race dynamic leads to tension and mistrust among the cartel members. For example, consider a scenario where five members of a cartel are scheduled to hold an emergency meeting. When the meeting starts there is an empty seat at the table -- one of the conspirators has not returned calls and has unexpectedly not arrived at the meeting. Red flags go up. One of the cartel members at the meeting starts to get nervous. Has the missing cartel member had a change of heart and abandoned the cartel? Has he gone to the Feds? Or, did he just miss his plane? In this environment, with the risk of detection and the stakes so high, who can you trust? Or consider the very common situation when a cartel first learns that its under investigation. Each member of that cartel knows that any of its co-conspirators can be the first to come forward in exchange for total amnesty and seal the fate of the rest. Imagine the vulnerability of being in that position and asking yourself, "Can I really trust my competitors?"

The Safe Harbors Are Shrinking. Of course, antitrust authorities in Europe and around the world share the credit for the heightened fear of detection by those who are engaging in, or are considering, cartel activity. This conference has already highlighted many of the changes in antitrust laws, the enforcement victories, and the commitment to anti-cartel enforcement that is taking hold throughout the world, so I will not try and summarize them here. Suffice to say, the world is changing, antitrust authorities are working

more closely together than ever, and the safe harbors for cartel activity are shrinking.

However, if you needed any more proof of how significantly attitudes have changed toward anti-cartel enforcement or how seriously the risks are now perceived by the international business community, consider the case of the six high-level European executives from HLR and BASF who led their companies' decade-long participation in the worldwide vitamin cartel. Each of these foreign executives voluntarily traveled to the United States to plead guilty and to serve time in a U.S. prison. They were all citizens of either Switzerland or Germany, residing abroad, with no family or other ties to the United States. Therefore, the United States courts had no personal jurisdiction over any of these individuals so long as they did not set foot on U.S. soil. Moreover, the United States does not have an extradition treaty with either Switzerland or Germany covering antitrust offenses. And so, you may wonder why did these six international executives agree to leave their families behind, submit to the jurisdiction of a U.S. court, agree to plead guilty, cooperate with our investigation, and serve time in a U.S. jail? I am sure there are many diverse and intensely personal reasons why these individuals arrived at the decisions they made. However, I'm convinced that all of these executives were driven, in large part, by the recognition that Europe and the rest of the world are changing their attitudes toward cartel activity. They did not want to live their lives as international fugitives in this changing world. The risk is too great. To me, this is the best indication that cartel members are getting the message.

V. Transparency In Enforcement Policies

Transparency In Enforcement Maximizes Cooperation. The third and final hallmark of both an effective Amnesty Program and an anti-cartel enforcement program is the need for transparency. Self reporting and cooperation from

offenders have been essential to our ability to detect and prosecute cartel activity. Cooperation from violators, in turn, has been dependent upon our readiness to provide transparency, to the greatest extent possible, throughout our anti-cartel enforcement program. If prospective cooperating parties cannot predict, with a high degree of certainty, their treatment following cooperation, then they are less likely to come forward.

Transparency must include not only explicitly stated standards and policies but also clear explanations of prosecutorial discretion in applying those standards and policies. The Division has sought to provide transparency in the following enforcement areas: (1) transparent standards for opening investigations; (2) transparent standards for deciding whether to file criminal charges; (3) transparent prosecutorial priorities; (4) transparent policies on the negotiation of plea agreements; (5) transparent policies on sentencing and calculating fines; and (6) transparent application of our Amnesty Program.[2] With the time I have remaining, I will address how transparency is critical to an effective Amnesty Program.

Transparency In The Amnesty Program. The Division has a written Amnesty Policy and has published a number of papers in order to clarify the Division's application of its Corporate Amnesty Program.[3] In addition, representatives

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[2] For a more detailed discussion on transparency in enforcement with references to Antitrust Division public statements in each of the areas outlined above, see, "Transparency In Enforcement Maximizes Cooperation From Antitrust Offenders," by Gary R. Spratling, Deputy Assistant Attorney General, Antitrust Division, before Fordham Corporate Law Institute (October 15, 1999).

[3] See e.g., "The Corporate Leniency Policy: Answers To Recurring Questions," speech by Gary R. Spratling, before

from the Division regularly speak about the Amnesty Program before national and international bar associations, trade groups, other law enforcement agencies, and the media. However, in order for an Amnesty Program to work, you need to do more than just publicize your policies and educate the public. You have to be willing to make the ultimate sacrifice for transparency - the abdication of prosecutorial discretion.

The Division's Amnesty Program by its nature is transparent because we have eliminated, to a great extent, the exercise of prosecutorial discretion in its application. If a corporation comes forward prior to an investigation and meets the program's requirements, the grant of amnesty is automatic and is not subject to the exercise of prosecutorial discretion. For those in the audience who are not current or former government officials, I can assure you that this is a very difficult thing to do. We have had to swallow hard on a number of amnesty applicants that we would have much preferred to prosecuted. However, remember we had roughly 15 years of experience with an Amnesty Program that was designed to maintain a greater degree of prosecutorial discretion, and it simply did not work. Prospective amnesty applicants come forward in direct proportion to the predictability and certainty of whether they will be accepted into the program. Uncertainty in the qualification process will kill an amnesty program.

ABA Antitrust Section 1998 Spring Meeting (April 1, 1998); "Making Companies An Offer They Shouldn't Refuse," speech by Gary R. Spratling, before Bar Association of the District of Columbia's 35th Annual Symposium on Associations and Antitrust (February 16, 1999).

VI. Conclusion

In closing, the formula for a successful anti-cartel enforcement program should include equal parts of stiff potential penalties, high detection rates, and transparent enforcement policies. This recipe will serve to prevent most companies from ever engaging in cartel activity. However, when cartels are formed, we have found that the Amnesty Program, with its lure of leniency in exchange for self reporting and full cooperation, is the most effective investigative tool for cracking cartel activity.

CORPORATE LENIENCY POLICY

The Division has a policy of according leniency to corporations reporting their illegal antitrust activity at an early stage, if they meet certain conditions. "Leniency" means not charging such a firm criminally for the activity being reported. (The policy also is known as the corporate amnesty or corporate immunity policy.)

A. Leniency Before an Investigation Has Begun

Leniency will be granted to a corporation reporting illegal activity before an investigation has begun, if the following six conditions are met:

1. At the time the corporation comes forward to report the illegal activity, the Division has not received information about the illegal activity being reported from any other source;

2. The corporation, upon its discovery of the illegal activity being reported, took prompt and effective action to terminate its part in the activity;

3. The corporation reports the wrongdoing with candor and completeness and provides full, continuing and

complete cooperation to the Division throughout the investigation;

4. The confession of wrongdoing is truly a corporate act, as opposed to isolated confessions of individual executives or officials;

5. Where possible, the corporation makes restitution to injured parties; and

6. The corporation did not coerce another party to participate in the illegal activity and clearly was not the leader in, or originator of, the activity.

B. Alternative Requirements for Leniency

If a corporation comes forward to report illegal antitrust activity and does not meet all six of the conditions set out in Part A, above, the corporation, whether it comes forward before or after an investigation has begun, will be granted leniency if the following seven conditions are met:

1. The corporation is the first one to come forward and qualify for leniency with respect to the illegal activity being reported;

2. The Division, at the time the corporation comes in, does not yet have evidence against the company that is likely to result in a sustainable conviction;

3. The corporation, upon its discovery of the illegal activity being reported, took prompt and effective action to terminate its part in the activity;

4. The corporation reports the wrongdoing with candor and completeness and provides full, continuing and complete cooperation that advances the Division in its investigation;

5. The confession of wrongdoing is truly a corporate act, as opposed to isolated confessions of individual executives or officials;

6. Where possible, the corporation makes restitution to injured parties; and

7. The Division determines that granting leniency would not be unfair to others, considering the nature of the illegal activity, the confessing corporation's role in it, and when the corporation comes forward.

In applying condition 7, the primary considerations will be how early the corporation comes forward and whether the corporation coerced another party to participate in the illegal activity or clearly was the leader in, or originator of, the activity. The burden of satisfying condition 7 will be low if the corporation comes forward before the Division has begun an investigation into the illegal activity. That burden will increase the closer the Division comes to having evidence that is likely to result in a sustainable conviction.

C. Leniency for Corporate Directors, Officers, and Employees

If a corporation qualifies for leniency under Part A, above, all directors, officers, and employees of the corporation who admit their involvement in the illegal antitrust activity as part of the corporate confession will receive leniency, in the form of not being charged criminally for the illegal activity, if they admit their wrongdoing with candor and completeness and continue to assist the Division throughout the investigation. If a corporation does not qualify for leniency under Part A, above, the directors, officers, and employees who come forward with the corporation will be considered for immunity from criminal prosecution on the same basis as if they had approached the Division individually.

D. Leniency Procedure

If the staff that receives the request for leniency believes the corporation qualifies for and should be accorded leniency, it should forward a favorable recommendation to the Office of Operations, setting forth the reasons why leniency should be granted. Staff should not delay making such a recommendation until a fact memo recommending prosecution of others is prepared. The Director of Operations will review the request and forward it to the Assistant Attorney General for final decision. If the staff recommends against leniency, corporate counsel may wish to seek an appointment with the Director of Operations to make their views known. Counsel are not entitled to such a meeting as a matter of right, but the opportunity will generally be afforded.

Issued August 10, 1993

APPENDIX N

DEPARTMENT OF JUSTICE

"DETECTING AND DETERRING CARTEL ACTIVITY THROUGH AN EFFECTIVE LENIENCY PROGRAM"

By

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Antitrust Division
U.S. Department of Justice

Presented before the

International Workshop on Cartels

Brighton, England
November 21-22, 2000

DETECTING AND DETERRING CARTEL ACTIVITY THROUGH AN EFFECTIVE LENIENCY PROGRAM

I. Introduction

Over the last five years, the United States' Corporate Leniency Program ("Amnesty Program") has been responsible for detecting and cracking more international cartels than all of our search warrants, secret audio or videotapes, and FBI interrogations combined. It is, unquestionably, the single greatest investigative tool available to anti-cartel enforcers. An effective Leniency Program will lead cartel members, in some cases, to confess their conduct even before an investigation is opened. In other cases, it will induce organizations already under investigation to abandon the cartel stonewall, race to the government, and provide evidence against the other cartel members. While the availability of some investigative techniques, such as consensual monitoring or the compulsion of sworn testimony, may be limited or nonexistent in jurisdictions where hardcore cartel activity is not a criminal offense, Leniency Programs can potentially be utilized in any jurisdiction where such conduct is treated as a criminal, civil or administrative offense.

This paper discusses the reasons behind the success of the U.S. Amnesty Program and identifies three hallmarks for both a successful Amnesty Program and an enforcement program that deters cartel activity. The issues of detection and deterrence are closely aligned because the bedrock principles that apply to effectively *preventing* cartels are also at the core of implementing a successful leniency program for *detecting* cartel activity once it does occur. The three critical ingredients are as follows. First, one's antitrust laws must provide the threat of stiff sanctions for those who participate in hardcore cartel activity. Second, organizations must perceive a significant risk of detection by antitrust authorities

if they engage in cartel activity. Third, antitrust authorities must provide transparency, to the greatest extent possible, throughout the anti-cartel enforcement program so that prospective cooperating parties can predict with a high degree of certainty their treatment following cooperation. These three major cornerstones -- stiff potential penalties, heightened fear of detection, and transparency in enforcement policies -- are at the heart of both our Amnesty Program and our deterrence efforts.

II. The Corporate Amnesty Program

Before addressing these three principles, it's important to share some background information on how the Amnesty Program was developed and how it works in order to put its impact fully into perspective. The original version of our Amnesty Program actually dates back to 1978. Under that program, violators who came forward and reported their illegal activity before an investigation was underway were *eligible* to receive a complete pass from criminal prosecution. The grant of amnesty, however, was not automatic and the Division retained a great deal of prosecutorial discretion in the decision making process. Unfortunately, for reasons discussed below, it became clear over time that this program was flawed. It resulted in relatively few amnesty applications and did not lead to the detection of a single international cartel.

In 1993, the Antitrust Division dramatically expanded its Amnesty Program to increase the opportunities and raise the incentives for companies to report criminal activity and cooperate with the Division. The Amnesty Program was revised in three major respects. First, the policy was changed to ensure that amnesty is *automatic* if there is no pre-existing investigation. That is, if a corporation comes forward prior to an investigation and meets the program's requirements, the grant of amnesty is certain and is not subject to the exercise of prosecutorial discretion. Second, the Division created an

alternative amnesty, whereby amnesty is available even if cooperation begins *after* an investigation is underway. Third, if a corporation qualifies for automatic amnesty, then all directors, officers, and employees who come forward with the corporation and agree to cooperate also receive automatic amnesty. (See attached Corporate Leniency Policy). One aspect of the program that did not change is that amnesty applies only to criminal sanctions, and firms accepted into the Amnesty program are required, where possible, to make full restitution to their victims in the United States.[1]

Because of the novelty and uniqueness of this policy, it took some time before the private bar and business community gained confidence in the program. However, over the last five years, the results have been staggering. There has been more than a ten-fold increase in amnesty applications during this time frame. In the last two years alone, cooperation from amnesty applications have resulted in scores of convictions and well over $1 billion in fines. More than anything else, the expansion of the Amnesty Program has been responsible for the success that we have had in cracking international cartels.

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[1]Under the U.S. program, corporate amnesty and corporate leniency are used interchangeably to mean a complete pass from criminal prosecution and zero dollars in fines for the anticompetitive conduct. This definition differs from other jurisdictions, such as the EU, that use "leniency" to refer to fine reductions from anywhere between 100 percent down to 10 percent.

III. The Threat Of Severe Sanctions

Treating Cartel Activity As A Crime. The first element common to both deterring cartel activity and creating a successful Leniency Program is the threat of severe sanctions for violators. In the United States, hardcore cartel activity -- such as price-fixing, bid-rigging, and customer and market allocation agreements -- is a felony violation of our criminal laws, and both corporations and individuals may be held liable. Corporations risk heavy criminal fines with the maximum potential fine being the greatest of $10 million, twice the gross gain to the cartel, or twice the gross loss suffered by the victims of the conspiracy. Relying on the twice the gross gain/loss formula, the Division has obtained criminal fines of up to $500 million. The maximum sentence for individuals is three years imprisonment and a fine which is the greatest of $350,000, twice the gross gain to the cartel, or twice the gross loss suffered by the victims of the conspiracy.

Of course, the United States is in the minority, albeit a substantial and growing one, in treating hardcore cartel activity as a crime and prosecuting offending corporations and individuals as criminals. I will not take this opportunity to explore all of the arguments in favor of prosecuting cartel activity criminally except to make the following point relevant to the discussion on deterrence. Based on our experience, there is no greater deterrent to the commission of cartel activity than the risk of imprisonment for corporate officials. Corporate fines alone are simply not sufficient to deter some would-be offenders. For example, in some cartels, such as the graphite electrode cartel individuals personally pocketed millions of dollars as a direct result of their criminal activity. In our view, a corporate fine alone, no matter how punitive, is unlikely to deter such individuals.

The Perceived Risks Must Outweigh The Potential Rewards. While there is no current consensus as to whether cartels should be prosecuted criminally, there should be no dispute that cartel activity will not be deterred if the potential penalties are perceived by firms and their executives as outweighed by the potential rewards. If the potential sentences are not sufficiently punitive, then the potential sanctions will merely be seen as a cost of doing business. To ensure that this is not the case, we have recently "upped the ante" by obtaining record-breaking fines against firms who engage in cartel activity. At the time the Amnesty Program was revised in 1993, the highest antitrust fine ever obtained in the United States was less than $3 million. Today, fines of $10 million or more have become almost commonplace with more than 30 imposed in the last five years. In fact, the Division has obtained fines of $100 million or more against five corporate defendants, including a $500 million fine against F. Hoffmann-La Roche (HLR) for its participation in the worldwide vitamin cartel. This dramatic leap in the level of criminal fines, however, is more than just a reflection of our aggressive approach for deterring cartel activity. Rather, because fines in the United States are based in large part on a company's sales in the United States affected by the conspiracy, the record fine levels demonstrate the mammoth size of the international cartels that we have been uncovering, largely through the amnesty program; cartels that simply dwarf the domestic conspiracies that we have previously encountered.

The HLR case also offers interesting, if not sobering, insight as to the risks companies are willing to take in order to profit from cartel activity and to how inadequate fines may be to ensure specific, let alone, general deterrence. In 1997, roughly two years before HLR's participation in the vitamin conspiracy was exposed, HLR was convicted of participating in a separate international cartel in the citric acid industry. The firm entered into a plea agreement, agreed to cooperate,

and was ordered to pay a $14 million fine -- which at the time was the third largest antitrust fine ever obtained in the United States. As part of its pledge to cooperate, HLR was told of the Division's then-covert investigation into the vitamin industry and offered the opportunity to cooperate. The Division interviewed two top executives from HLR who participated in the citric acid conspiracy and who also had dual responsibilities in HLR's vitamin business. HLR and its top executives denied to our investigators any knowledge of, or participation in, a vitamin cartel. Of course, we would later learn that HLR executives had, in fact, engaged in a decade-long, worldwide vitamin cartel, and continued to lead that cartel even after it pled guilty in the citric acid investigation and learned that its vitamin business was under investigation. Instead of being deterred, top-level HLR executives orchestrated false statements to enforcement authorities, took steps to further conceal the firm's illegal activities, and continued to lead the world's other producers in a global cartel. This decision will end up costing HLR well over a billion dollars in criminal fines and civil settlements. In addition, three European executives from HLR, including the two executives who blew their opportunity to come clean in the citric acid investigation, served time in U.S. prisons for their participation in the vitamin conspiracy. Clearly, the $14 million fine in the citric acid prosecution was not nearly enough to deter HLR or its top executives from continuing to participate in the vitamin cartel. Time will tell if the $500 million fine and jail sentences for the HLR executives will be a better deterrent.

Corporate Amnesty Can Mean Zero Fines and No Jail. Of course, the Amnesty Program offers companies and their executives an alternative to these potentially harsh sentences. If a company detects an antitrust violation, it has to chose whether to report the violation and seek leniency or to remain silent and hope for the best.

The question is often raised as to whether an Amnesty Program will work in a jurisdiction where there is no individual liability and, therefore, no possibility of incarceration for culpable executives. Clearly, the opportunity to avoid imprisonment for corporate officials is a major inducement for firms to seek amnesty. However, an Amnesty Program can still succeed if the threat of heavy fines is significant enough. This belief is supported by our experience with foreign-based firms who have sought and obtained amnesty in international cases at a rate almost equal to their domestic counterparts. For example, the worldwide vitamin cartel was cracked by the cooperation provided by French-based Rhône-Poulenc SA.[2] The company made the decision to come forward even though the culpable French executives resided outside of the United States and our extradition treaty with France does not cover antitrust offenses. So, the opportunity to avoid incarceration for its culpable executives was probably not the major inducement to Rhône-Poulenc's decision to come forward, but rather the desire to avoid a criminal conviction and heavy fine for the corporation. And, indeed, while Rhône-Poulenc paid zero dollars in fines, its principal co-conspirators, HLR and BASF, paid fines of $500 million and $225 million, respectively.

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[2] The Division has a policy of treating the identity of amnesty applicants as a confidential matter, much like the treatment afforded to confidential informants. However, confidentiality is not required in this case, with respect to Rhône-Poulenc's amnesty status, because the company has already issued a press release announcing its acceptance into the Amnesty Program.

IV. Fear Of Detection

Building A Strong Enforcement Record. Of course, if firms perceive the risk of being caught by antitrust authorities as very small, then stiff maximum penalties will not be sufficient to deter cartel activity. Likewise, if cartel members do not fear detection, they will not be inclined to report their wrongdoing to authorities in exchange for leniency. Therefore, antitrust authorities must cultivate a law enforcement environment in which business executives perceive a significant risk of detection by antitrust authorities if they either enter into, or continue to engage in, cartel activity.

Over the last five years, we have built a strong enforcement record that demonstrates our commitment to fighting cartel activity. Moreover, the fines obtained in these cases have increased dramatically. Still, the question remains whether the $100 million-plus fines are having a deterrent effect by either stifling the formation of cartels or disbanding them if they already exist? There is no way to quantify the number of cartels that are deterred before they are ever formed, but we can observe how our enforcement efforts are influencing cartels that already exist. To put it plainly, cartel members are starting to sweat, and the Amnesty Program feeds off that panic.

The Race To The Courthouse. The more anxious a company is that its cartel participation may be discovered by the government, the more likely it is to report its wrongdoing in exchange for amnesty. Of course, amnesty is only available to the first one in the door. If you are second, even if only by a matter of a few hours, which has happened on a number of occasions, the second firm and all of its culpable executives will be subject to full prosecution.

This "winner-take-all" approach sets up a race, and this dynamic leads to tension and mistrust among the cartel members. For example, consider a scenario where five members of a cartel are scheduled to hold an emergency meeting. When the meeting starts there is an empty seat at the table -- one of the conspirators has not returned calls and has unexpectedly not arrived at the meeting. One of the cartel members at the meeting starts to get nervous. Has the missing cartel member had a change of heart and abandoned the cartel? Has he gone to the Feds? Or, did he just miss his plane? In this environment, with the risk of detection and the stakes so high, who can you trust? Or consider the very common situation when a cartel first learns that it is under investigation. Each member of that cartel knows that any of its co-conspirators can be the first to come forward in exchange for total amnesty. A decision that will seal the fate of the rest. Imagine the vulnerability of being in that position and asking yourself, "Can I really trust my competitors?"

The Safe Harbors Are Shrinking. Of course, antitrust authorities in Canada, Europe and around the world share the credit for this heightened fear of detection. The Brighton conference will highlight many of the changes in antitrust laws, the enforcement victories, and the commitment to anti-cartel enforcement that is taking hold throughout the world, so I will not try to summarize them here. Suffice to say, the world is changing, antitrust authorities are working more closely together than ever, and the safe harbors for cartel activity are shrinking.

However, if you want any more proof of how significantly attitudes have changed toward anti-cartel enforcement or how seriously the risks are now perceived by the international business community, consider the case of the six high-level European executives from HLR and BASF who led their companies' decade-long participation in the worldwide vitamin cartel. Each of these foreign executives

voluntarily traveled to the United States to plead guilty and to serve time in a U.S. prison. They were all citizens of either Switzerland or Germany, residing abroad, with no family or other ties to the United States. Therefore, the United States courts had no personal jurisdiction over any of these individuals so long as they did not set foot on U.S. soil. Moreover, the United States does not have an extradition treaty with either Switzerland or Germany covering antitrust offenses. And so, you may wonder why did these six international executives agree to leave their families behind, submit to the jurisdiction of a U.S. court, agree to plead guilty, cooperate with our investigation, and serve time in a U.S. jail? I am sure there are many diverse and intensely personal reasons why these individuals arrived at the decisions they made. However, I'm convinced that all of these executives were driven, in large part, by the recognition that Europe and the rest of the world are changing their attitudes toward cartel activity. They did not want to live their lives as international fugitives in this changing world. The risk is too great. To me, this is the best indication that cartel members are getting the message.

V. Transparency In Enforcement Policies

Transparency In Enforcement Policies Maximizes Cooperation. The third and final hallmark of both an effective Amnesty Program and an anti-cartel enforcement program is the need for transparency in enforcement policies. Self reporting and cooperation from offenders have been essential to our ability to detect and prosecute cartel activity. Cooperation from violators, in turn, has been dependent upon our readiness to provide transparency, to the greatest extent possible, throughout our anti-cartel enforcement program. If prospective cooperating parties cannot predict, with a high degree of certainty, their treatment following cooperation, then they are less likely to come forward.

Our experience has been that transparency must include not only explicitly stated standards and policies, but also clear explanations of prosecutorial discretion in applying those standards and policies. The Division has sought to provide transparency in the following enforcement areas: (1) transparent standards for opening investigations; (2) transparent standards for deciding whether to file criminal charges; (3) transparent prosecutorial priorities; (4) transparent policies on the negotiation of plea agreements; (5) transparent policies on sentencing and calculating fines; and (6) transparent application of our Amnesty Program.[3] However, this paper will focus on how transparency is critical to an effective Amnesty Program.

Transparency In The U.S. Amnesty Program. The Division has a written Amnesty Policy and has published a number of papers in order to clarify the Division's application of its Corporate Amnesty Program.[4] In addition, representatives from the Division regularly speak about the Amnesty Program before national and international bar associations, trade groups, other law enforcement agencies,

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3 For a more detailed discussion on transparency in enforcement with references to Antitrust Division public statements in each of the areas outlined above, see, "Transparency In Enforcement Maximizes Cooperation From Antitrust Offenders," by Gary R. Spratling, Deputy Assistant Attorney General, Antitrust Division, before Fordham Corporate Law Institute (October 15, 1999).

4 See e.g., "The Corporate Leniency Policy: Answers To Recurring Questions," speech by Gary T. Spratling, before ABA Antitrust Section 1998 Spring Meeting (April 1, 1998); "Making Companies An Offer They Shouldn't Refuse," speech by Gary R. Spratling, before Bar Association of the District of Columbia's 35th Annual Symposium on Associations and Antitrust (February 16, 1999).

and the media. However, in order for an Amnesty Program to work, an antitrust authority must do more than just publicize its policies and educate the public. It has to be willing to make the ultimate sacrifice for transparency - the abdication of prosecutorial discretion.

Our Amnesty Program by its nature is transparent because we have eliminated, to a great extent, the exercise of prosecutorial discretion in its application. Obviously, this is a very difficult thing to do, and we have had to swallow hard on a number of amnesty applicants that we would have preferred to prosecute. However, remember we had roughly 15 years of experience with an Amnesty Program that was designed to maintain a greater degree of prosecutorial discretion, and it simply did not work. Prospective amnesty applicants come forward in direct proportion to the predictability and certainty of whether they will be accepted into the program. Uncertainty in the qualification process will kill an amnesty program.

Below are three examples of instances where our program, as well as other programs, have sacrificed prosecutorial discretion in order to maximize predictability and transparency in the qualification process. In each instance, this approach is contrasted with the alternative approaches exemplified by our prior 1978 program and, as I understand it, the present EU program.

Automatic Amnesty If No Pre-Existing Investigation. If a company comes forward and reports its wrongdoing before an investigation has begun and meets the program's other conditions, the grant of amnesty is automatic and the organization pays zero dollars in fines. There is no prosecutorial discretion involved. As we understand it, the Canadian, United Kingdom (UK), and German Leniency Policies have also adopted this approach. The policy creates the maximum incentives for companies to defect from the cartel and report the conduct. It's clear that without the

certainty of obtaining the maximum reward, a number of massive global cartels that have recently been identified and prosecuted would still be acting with impunity today.

The European Union (EU) has taken a different approach with its Leniency Policy. Its policy provides a sliding scale whereby a company that reports wrongdoing before an investigation has begun, and meets all of the other requirements of the program, is eligible for a reduction in fines ranging from 75 percent to 100 percent. (The potential reduction drops down to between 50 percent and 75 percent if it meets all of the program's conditions, but informs the Commission after an investigation has started.) However, since an organization's potential fine exposure in the EU is 10 percent of the worldwide turnover for all products sold by the company, the difference between total and partial amnesty may be very significant. For example, a multinational corporation with worldwide annual revenue of $1 billion still faces a potential maximum EU fine of $250 million, even if it brings the illegal conduct to the attention of the EU. Of course, this may well overstate the amount of the fine that would be imposed in such a case. Still, if a company cannot accurately predict how it will be treated as a result of its corporate confession, our experience suggests that it is far less likely to report its wrongdoing, especially where there is no ongoing government investigation.

Measuring The Value Of Cooperation. Under the U.S., Canadian, and U.K. programs, applicants must report their involvement with candor and completeness and must provide full, continuing, and complete cooperation that advances the investigation. In some cases, an amnesty applicant's cooperation will provide sufficient evidence to convict all of the remaining cartel members. However, in other cases, the applicant's full cooperation will not, in and of itself, amount to "decisive" evidence of the existence of the cartel, but it may *lead to* such evidence. Therefore, the U.S. Canadian,

and U.K. programs do not have a "decisive evidence" requirement in their leniency programs. In fact, some of the best results under our amnesty program were achieved with the help of amnesty applicants who would not have qualified under such a subjective evidentiary standard. For example, in our graphite electrodes investigation, the amnesty applicant played only a peripheral role in the conspiracy and thus was not able to provide us with "decisive evidence." In this respect, the company's mitigating role made it more attractive as an amnesty applicant than the other members of the cartel that were far more culpable. While the amnesty applicant did not attend the key conspiratorial meetings, it provided the Division with information that allowed us to obtain warrants to search the offices of several of the cartel members. The execution of the warrants together with the other cartel members' knowledge of an insider's cooperation quickly led to the cooperation and guilty pleas of the remaining six conspirators and nearly $300 million in fines. So, while an amnesty applicant's cooperation alone may not always add up to decisive evidence, it can provide us with leads and opportunities that will take us to additional evidence and, ultimately, result in successful prosecutions.

In contrast, the EU Program requires that the leniency applicant come forward "with decisive evidence proving the existence of the cartel." Our experience suggests that, this high standard will automatically disqualify potentially valuable leniency applicants. But there is an additional problem with the use of a "decisive evidence" standard. Because the standard is necessarily subjective, potential amnesty applicants may not be able to predict with significant certainty whether an antitrust authority will consider its proffer of evidence to meet the standard. To the extent potential applicants view this standard as subjective and cannot predict the outcome of their application, the requirement runs the substantial risk of dissuading potential applicants from coming forward.

Consider the hypothetical case of a company that is deciding whether to report conduct to the EU before there is an open investigation. Assume the company has no "smoking gun" documents, but can provide the cooperation of several employees who directly participated in the cartel, and can detail the operation of the conspiracy, including the time and place of key meetings, the participants, and any agreements that were reached. In assessing whether to report the conduct, this hypothetical company has first to decide whether it can meet the decisive evidence standard. Aware of the EU's historical emphasis on documentary evidence, it may be unsure as to whether it will fall short of this standard. However, whether this standard is met can have huge consequences for the company. Assuming it meets the decisive evidence standard (as well as the program's other requirements), the company can qualify for up to a 100% reduction in its fine. However, if it fails to satisfy this standard, the company, which has brought the cartel to the EU's attention in the first place, is only guaranteed a 10 percent reduction in its fine. If a company is uncertain as to how it will be treated as a result of its cooperation, we believe that it will often make the decision not to cooperate at all.

Role In The Offense Requirement. A final area where leniency programs may differ in terms of the potential exercise of prosecutorial discretion relates to the amnesty applicant's role in the offense. In order to qualify under the U.S., Canadian, and U.K. programs, the applicant must not have coerced another party to take part in the offense and must not be "*the*" instigator or "*the*" leader of the illegal activity. In each of these programs, applicants will only be disqualified from obtaining total amnesty if they are clearly the single organizer or single ringleader of a conspiracy. If, for example, there are two ringleaders in a five-firm conspiracy, then all of the firms, including the two leaders, are potentially eligible for amnesty. Or, if in a two-firm conspiracy, each firm played a decisive role in the operation

of the cartel, both firms may qualify for amnesty. Wherever possible, we have tried to tilt our program in favor of accepting the amnesty applicant into our program in order to provide the maximum incentives and opportunities for companies to come forward and report illegal activity. As a result, the antitrust bar has confidence that they can accurately advise clients as to whether they are likely to qualify for leniency under our program.

Our approach to the "role in the offense" requirement is distinguished from the EU program which requires that the applicant not have acted as *"an"* instigator or *"a"* ringleader, and the German program which requires that the applicant not have played a "decisive role" in the cartel. The language of these programs suggests that more than one company may be ineligible for full amnesty in a given cartel. Understandably, there may be serious cultural and legal issues which would lead a competition authority to adopt a leniency program that excludes any party that played "*a*" leading role in the offense, regardless of whether they were the sole leader or merely a co-leader. However, like the decisive evidence standard requirement discussed above, there are costs to retaining one's discretion in this area. If companies cannot confidently predict how an enforcement authority will apply this standard, then they may ultimately decide against self reporting and cooperation, and existing cartels will go unreported and unpunished.

VI. Conclusion

There is global interest in the use and development of Corporate Leniency Programs as a means of detecting and cracking international cartel activity. The message has been clear that Leniency Programs can provide antitrust enforcers with an unprecedented tool for detecting and investigating cartel activity. The formula for a successful anti-cartel enforcement program should include equal parts of stiff potential penalties, high detection rates, and transparent

enforcement policies. This recipe will serve to prevent most companies from ever engaging in cartel activity. However, when cartels are formed, we have found that the Amnesty Program, with its lure of leniency in exchange for self reporting and full cooperation, is the most effective investigative tool for cracking cartel activity.

APPENDIX O

DEPARTMENT OF JUSTICE

The Fifteenth Annual

NATIONAL INSTITUTE ON WHITE COLLAR CRIME

Presented By The
-ABA's Criminal Justice Section

"WHEN CALCULATING THE COSTS AND BENEFITS OF APPLYING FOR CORPORATE AMNESTY, HOW DO YOU PUT A PRICE TAG ON AN INDIVIDUAL'S FREEDOM?"

By

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Presented at

The Westin St. Francis Hotel
San Francisco, California

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WHEN CALCULATING THE COSTS AND BENEFITS OF APPLYING FOR CORPORATE AMNESTY, HOW DO YOU PUT A PRICE TAG ON AN INDIVIDUAL'S FREEDOM?

I. The Fork In The Road

When a company discovers that it has committed an antitrust crime, it has two options. It can either report the conduct and seek corporate amnesty or take cover and hope to avoid prosecution. Since this is often a difficult decision, the Antitrust Division has tried to make it easier by making the consequences of pursuing each option as clear and distinct as possible. We developed a Corporate Leniency Program ("Amnesty Program") that provides the ultimate prize for companies that choose to self report -- no criminal conviction, no criminal fine, and non-prosecution protection for all officers, directors, and employees -- and we made the requirements for entering the program as transparent and attainable as possible.[1] No other governmental voluntary

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[1] For a more detailed discussion of the requirements and application of the Division's Amnesty Program, see, "The Corporate Leniency Policy: Answers To Recurring Questions," speech by Gary R. Spratling, Deputy Assistant Attorney General, Antitrust Division, before ABA Antitrust Section 1998 Spring Meeting (April 1, 1998); "Making Companies An Offer They Shouldn't Refuse," speech by Gary R. Spratling, before Bar Association of the District of Columbia's 35th Annual Symposium on Associations and Antitrust (February 16, 1999); and "Lessons Common To Detecting And Deterring Criminal Activity," speech by Scott D. Hammond, before 3rd Nordic Competition Policy Conference (September 12, 2000). All of the Division

disclosure program creates as great an opportunity or incentive for corporations to come forward and cooperate.

Conversely, companies that do not take advantage of the Amnesty Program and elect to hunker down risk enormous legal, financial, and human consequences. The Division has raised the stakes for companies that choose the wait-and-see approach by instituting policies and strategies that (1) dramatically increase the risk that antitrust violations will ultimately be detected, and (2) result in severe consequences for companies and their executives who fail to provide timely cooperation. This paper will explore some of these policies and, in particular, will explain how a company's failure to seek corporate amnesty or, at least, provide timely cooperation can have potentially devastating consequences on a company's greatest asset -- its officers, directors, and employees.

II. Choosing Not To Come Forward Is An Increasingly Risky Strategy

It is a far riskier proposition today to roll the dice and choose not to report antitrust wrongdoing than it used to be. The Division simply has more investigative tools in its arsenal than ever before. Our ability to discover and investigate antitrust offenses has dramatically improved based on a number of developments, including: (1) the high incidence of self reporting by amnesty applicants, as well as early cooperation from companies and individuals, even when amnesty is no longer available; (2) the Division's highly successful proactive use of amnesty, referred to as "Amnesty Plus," complemented by its proactive efforts to profile markets where cartel activity may be ongoing; and (3)

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speeches cited in this paper can be found at the Division's website at www.usdoj.gov/atr.

the increased enforcement efforts and assistance provided by foreign antitrust authorities.[2]

A. The Amnesty Race

Over the last five years, the Amnesty Program has been responsible for detecting and prosecuting more antitrust violations than all of our search warrants, consensual-monitored audio or video tapes, and cooperating informants combined. It is unquestionably, the single greatest investigative tool available to anti-cartel enforcers. Since we expanded our Amnesty Program in 1993, there has been more than a ten-fold increase in amnesty applications. In the last two years, cooperation from amnesty applicants has resulted in scores of convictions and well over $1 billion in fines. Moreover, a number of other countries, including Canada, the United Kingdom, Germany, and Brazil, as well as the European Union (EU), have followed with their own leniency programs. With the global interest and attention on leniency programs, the percentage of foreign-based companies applying for amnesty in the United States is approaching the rate of U.S.-based applicants.

The Amnesty Program works because it offers a very predictable and favorable alternative to the potentially devastating corporate and individual consequences if we discover the conduct the hard way. The catch is that it is only available to the first one in the door. If you are second, even if only by a matter of a few hours, which has happened

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[2] Other factors which have contributed to our success in fighting international cartels, such as the reallocation of additional resources to fighting international cartels and our improved working relationships with the FBI and the INS, are discussed in more detail at "Are the Recent Titanic Fines in Antitrust Cases Just the Tip of the Iceberg?," speech by Gary R. Spratling, before ABA National Institute On White Collar Crime (March 6, 1998).

on a number of occasions, the second firm and all of its culpable executives will be subject to full prosecution. This "winner-take-all" approach sets up a race, and this dynamic leads to tension and mistrust among the cartel members. For example, consider the very common situation when a cartel first learns that it is under investigation, and each member of that cartel knows that any of its co-conspirators can be the first to come forward in exchange for total amnesty – a decision that will seal the fate of the rest. Imagine the vulnerability of being in that position and asking yourself, "Can I really put my trust in my competitors?"

1. Opening Up The Race By Not Requiring "Decisive Evidence" For Admission

The Division has adopted a number of policies and strategies to further fuel the amnesty race dynamic. For example, the Division's Amnesty Program does not impose the "decisive evidence" requirement found in the EU leniency model.[3] Under our program, applicants must report their involvement with candor and completeness and must provide full, continuing, and complete cooperation that advances the investigation. In some cases, an amnesty applicant's cooperation will provide sufficient evidence to convict all of the remaining cartel members. However, in other cases, the applicant's full cooperation will not, in and of itself, amount to "decisive" evidence of the existence of the cartel, but it may *lead to* such evidence. In fact, some of the best results under our amnesty program were achieved with the help of amnesty applicants that, because of their peripheral role, would not have qualified under a decisive evidence standard.[4] The absence of a decisive evidence

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[3] The Canadian, U.K., and Brazilian leniency programs also do not have decisive evidence requirements.

[4] For example, in our graphite electrodes investigation, the amnesty applicant played only a peripheral role in the

requirement intensifies the race by expanding the field of players that are eligible to claim the big prize. In addition, this policy removes any incentive for a company to settle on a strategy to sit back after conducting its internal investigation in hopes that it will be able to leapfrog over another company that may subsequently bring the matter to our attention by quickly coming forward and giving us the case with a nice bow on it. Such a strategy simply will not work.

2. Securing Your Place In Line With A Marker

Consistent with the Division's message that guilty parties should come forward as soon as possible in order to obtain amnesty, the Division has adopted a policy that allows a company to secure its place at the front of the line by reporting the criminal conduct and putting down a "marker." The company will then be given a certain period of time to complete its internal investigation, report its findings to the Division, and perfect its amnesty application. The period of time afforded to a company for perfecting its application will vary depending on the circumstances. For example, if a company comes forward to report criminal conduct and requests a marker on a matter in which there is no open investigation, it may be appropriate to grant the company

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conspiracy and thus was not able to provide us with "decisive evidence." In this respect, the company's limited role made it more attractive as an amnesty applicant than the other members of the cartel that were far more culpable. While the amnesty applicant did not attend the key conspiratorial meetings, it provided the Division with information that allowed us to obtain warrants to search the offices of several of the cartel members. The execution of the warrants, together with the other cartel members' knowledge of an insider's cooperation, quickly led to the guilty pleas of other co-conspirators.

several weeks to complete its internal investigation. On the other hand, if a company comes forward and reports criminal conduct in an ongoing investigation, depending on the circumstances, the marker may be available for only a few days or may not be available at all.

The use of the marker system underscores the importance of companies coming forward as soon as possible after detection of the offense. While the company has a marker, no other company will be permitted to jump over the amnesty applicant at the front of the line, even one prepared to perfect its amnesty application immediately. If the company holding the marker fails to perfect its application within the allotted time frame, it will lose its place in line and other companies will then be considered for amnesty in the order in which they came forward.

To ensure that companies are not penalized for coming forward before they have completed their internal investigation, the Division's policy is to protect amnesty applicants if, as a result of the company's good faith efforts, their executives disclose additional antitrust offenses that were not reported in the original amnesty application. For example, if an ensuing investigation uncovers anticompetitive activity that is more extensive than the conduct originally reported or falls outside of the non-prosecution protection of the conditional amnesty letter,[5] then the amnesty coverage will be expanded to include the newly discovered conduct so long as the company has met its cooperation obligations and the company can meet the criteria for amnesty on the newly discovered conduct.

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[5] For example, an applicant's cooperation may lead to evidence showing that the anticompetitive activity was broader in terms of its geographic scope or the number of products covered by the conspiracy.

B. Amnesty Plus, Cartel Profiling, And Other Proactive Strategies

1. The Division's Track Record

There are over 30 sitting grand juries currently investigating suspected international cartel activity. Amazingly, over half of these investigations were initiated as a result of leads generated during an investigation of a completely separate market. What that simply means is that every time the Division opens an international cartel investigation, the chances are better than even that it will also uncover a second, separate conspiracy. This recurring pattern has led the Division to develop a number of proactive strategies for uncovering antitrust offenses. Before discussing these strategies, however, let me offer two prime examples of the "rollover" pattern.

It has been widely acknowledged that one of the keys to the Division's success in cracking the worldwide vitamin cartel was the cooperation provided by Rhône-Poulenc SA pursuant to its amnesty application. However, what may not be fully appreciated is that the Division had been investigating the vitamin industry for more than two years before Rhône-Poulenc came forward. By the time Rhône-Poulenc sought amnesty, the investigation had already uncovered conspiracies to fix prices and allocate markets in smaller vitamins, such as naicin, naicinamide, and choline chloride. These investigations were generating leads that indicated the existence of cartel activity in the massive vitamin A, C, and E markets. It was the development of these leads that precipitated Rhône-Poulenc's decision to seek amnesty. With one investigation rolling over into the next, the Division has to date uncovered cartel activity in 12 different vitamin markets. These investigations have led to the prosecution of 11 companies and 13 individuals, nearly

$1 billion in fines, and the incarceration of 11 executives, including 6 foreign nationals. The investigation is continuing.

The second example involves the fruits of the Division's investigation of the worldwide lysine cartel. This example is particularly instructive because, while the targeted markets here are not nearly as closely related as they were in the vitamin cases, each investigation led directly to the next. The connection between the Division's lysine and citric acid investigations is generally known because of the publicity surrounding the prosecution of ADM and its former high-ranking executives. However, what is not as evident is that the investigation and prosecution of the international *citric acid* cartel led to the investigation and prosecution of the international *sodium gluconate* cartel which resulted in the investigation and prosecution of the international *sodium erythorbate* cartel which, in turn, led to the investigation and prosecution of the *maltol* cartel. In all, 10 companies and 11 individuals from 7 different countries were convicted and paid over $225 million in criminal fines as a result of the these five inter-connected investigations.

2. The Amnesty Plus Program

In response to the recurring patterns described above, the Division has developed a number of proactive strategies for uncovering antitrust offenses. First, the Division has developed a policy called "Amnesty Plus." The policy takes a proactive approach to attracting amnesty applications by encouraging subjects and targets of ongoing investigations to consider whether they may qualify for amnesty in other markets where they compete. So, even though a company may not qualify for amnesty for the initial offense, the value of its assistance in disclosing a second cartel will lead to amnesty for the latter offense and a substantial additional reduction in the fine it would pay for its participation in the first offense. The Division's Amnesty Plus program creates

an attractive inducement for encouraging companies who are already under investigation to report the full extent of their antitrust crimes and begin to put the matters behind them.[6]

3. Cartel Profiling

However, as indicated from the vitamin and lysine examples discussed above, the Division will not relax and wait for companies to come forward and report new violations. Instead, the Division has had success engaging in "cartel profiling" aimed at ferreting out these violations. The Division will target its proactive efforts in industries where we suspect cartel activity in adjacent markets or which involve one or more common players from other cartels. The Division has developed a proven track record of digging deep and uncovering related offenses through the "cartel profiling" technique. A company that is fortunate enough to uncover its participation in a second conspiracy before we do is advised to take advantage of the Amnesty Plus program while it is still available.

4. Penalty Plus -- The "Stick" Side To The Amnesty Plus Carrot

Companies that elect not to take advantage of the Amnesty Plus opportunity risk potentially harsh consequences. If a company is knowledgeable about a second offense and decides not to report it, and the conduct is later discovered and successfully prosecuted, where appropriate, we will urge the sentencing court to consider the company's and any culpable executive's failure to report the conduct voluntarily as an aggravating sentencing factor. We will request that the court impose a term and conditions of probation for the company pursuant to U.S.S.G. §8D1.1, and

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[6] For a more detailed discussion of the Division's Amnesty Plus program, see, "Making Companies An Offer They Shouldn't Refuse" at pp. 7-8.

we will pursue a fine or jail sentence at or above the upper end of the Guidelines range. Moreover, where multiple convictions occur, a company's or individual's Guidelines calculations may be increased based on the prior criminal history. For a company, the failure to self report under the Amnesty Plus program could mean the difference between a potential fine as high as 80 percent or more of the volume of affected commerce versus no fine at all on the Amnesty Plus product. For the individual, it could mean the difference between a lengthy jail sentence and avoiding jail altogether.

C. Increased Assistance From Foreign Antitrust Authorities

Our ability to detect and prosecute international cartel activity has been enhanced by the increased cooperation and assistance that we have received from foreign governments, and from their own enforcement efforts. The Division has been at the forefront in building a worldwide consensus that international cartel activity is pervasive and is victimizing businesses and consumers everywhere, and in establishing cooperative relationships with the competition authorities in other countries in order to more effectively investigate and prosecute international cartels. For example, in the Fall of 1999, the Division hosted the first ever international meeting of cartel investigators and prosecutors. Representatives from the competition law enforcement agencies of over 25 countries and the EU gathered in Washington for a two-day program devoted to the practical aspects of investigating and prosecuting international cartels. The event was such a success that the U.K.'s Office of Fair Trading hosted a similar conference last year, and the Canadian Bureau of Competition is already planning for the next workshop in November 2001. Perhaps even more important than the exchange of ideas and "best practices" at these meetings, the workshops have provided enforcers with the opportunity to

develop close working relationships which then serve as the basis for future formal and informal cooperation.

The improved cooperation with foreign law enforcement authorities has provided us with increased access to foreign-located evidence and witnesses that has proven to be instrumental in the cracking of a number of international cartels. While I am constrained as to what I can reveal about the nature of this assistance, I will offer one compelling statistic to demonstrate the breadth of this cooperation. *In the last year alone,* foreign authorities from *five* different countries have executed *search warrants* at our request in more than a half-dozen of our international cartel investigations. For anyone who is familiar with the history of foreign assistance in antitrust matters, this is a remarkable advancement in international cooperation.

Of course, antitrust authorities in Europe, Asia, and around the world are not content with merely assisting our investigations and are becoming increasingly aggressive in investigating and sanctioning cartels that victimize their consumers. Seemingly with each passing day, the antitrust community learns of a foreign government that has enacted a new antitrust law, created a new cartel investigative unit, obtained a record antitrust fine, or developed a new Corporate Leniency program. Suffice to say, the world is changing, antitrust authorities are working more closely together than ever, and the safe harbors for cartel activity are shrinking.

D. <u>Financial Benefits Of Seeking Amnesty</u>

Given the risks of detection described above, it is not surprising that so many U.S. and foreign companies are choosing to come forward and seek corporate amnesty instead of hunkering down and taking their chances. Quite often the difference between first or second in the door can be measured in tens, if not hundreds, of millions of dollars in

fines, as well as criminal exposure for the culpable executives. For example, the vitamin, graphite electrode, marine construction, and fine arts auction investigations are prime examples of the stunning financial advantages for companies that take advantage of the Amnesty Program.[7] In each of these matters, the amnesty applicant paid *zero* dollars in criminal fines.

- Vitamins. In the vitamin investigation, the applicant's cooperation directly led to F. Hoffman-La Roche's and BASF's decision to plead guilty and pay fines of $500 million and $225 million, respectively.

- Graphite Electrodes. In the graphite electrode investigation, the next company in the door after the amnesty applicant paid a $32.5 million fine, the third company in paid a $110 million fine, and a fourth company pled guilty and paid a $135 million. Mitsubishi was recently convicted at trial for its role in the cartel and is scheduled to be sentenced in May 2001.

- Marine Construction. In the marine construction investigation, a corporate co-conspirator agreed to plead guilty and cooperate with the government's investigation shortly after the investigation went overt

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[7] The Division's policy is to treat as confidential the identity of amnesty applicants and any information obtained from the applicant. Thus, the Division will not disclose an amnesty applicant's identity, absent prior disclosure by or agreement with the applicant, unless required to do so by court order. In the four cases noted herein -- vitamins, graphite electrodes, marine construction, and fine arts auctions -- the amnesty applicants issued press releases announcing their conditional acceptance into the Corporate Amnesty Program thereby obviating the need to maintain their anonymity.

based on information provided by the amnesty applicant. Though the company provided very valuable cooperation and received a significant reduction in its fine for that cooperation, it still paid a fine of $49 million.

- Fine Art Auctions. The amnesty applicant's cooperation directly resulted in Sotheby's decision to plead guilty and pay a $45 million fine.

Some commentators have downplayed the financial benefits of the Amnesty Program by noting that any savings are more than outweighed by the company's exposure to treble damage actions by the victims and the possible exposure to financial penalties in other jurisdictions. Some have advised that, before making a decision to seek amnesty, companies should conduct a cost/benefit analysis factoring in only the companies' potential financial exposure -- to other jurisdictions, to the victims, to indirect purchasers, to shareholders, and to others. There are two serious problems with this approach.

One, the analysis makes sense only if you assume that the company can avoid prosecution and the parade of financial horribles if *it* chooses not to come forward. However, for the reasons described above, that outcome is almost always going to be out of the company's control. A company that elects not to come forward and puts itself and its best interests at the mercy of its competitors (and all of their current and former executives with knowledge of the conspiracy) is taking a grave risk. In most cases, by the time the inside or outside counsel learns of the offense, it is already too late to contain the leakage of information to the government. The boat is already sinking, and the only question is whether you are going to grab the life preserver.

As discussed below, the second problem with approaching the decision whether to seek amnesty through a

financial cost/benefit analysis is that there is no way to quantify the value of the program's greatest benefit -- non-prosecution protection for all officers, directors, and employees. How do you put a price tag on an individual's freedom?

III. Individuals Have The Most At Stake In The Amnesty Decision

A. Individual Defendants Face An Increasing Risk Of Jail

A company's failure to seek corporate amnesty can have potentially devastating consequences on its executives. If the company gambles that it can avoid prosecution and loses, its executives will pay what most would consider the heaviest price. In the past two years, the stakes have increased for individuals. While many observers have focused on the record corporate fines over the last few years, fewer have recognized the recent dramatic increase in the length and incidence of individual jail sentences.

- **Number of Individuals Jailed.** An individual defendant faces a greater risk of jail time today than even a few years ago. Approximately 50 individual defendants were imprisoned for antitrust and related offenses in FYs 1999 and 2000, which is more than the total number of individuals imprisoned in the previous *five years combined.*

- **Total Jail Days.** Similarly, individual defendants were sentenced to more jail days in FYs 1999 and 2000 (12,246 days) than in the prior five years combined (9,920 days). That equates to nearly 34 years of jail time imposed in FYs 1999 and 2000, including *15* sentences of 12 months or more.

- **Foreign Nationals Jailed.** The Division has convicted foreign executives from Germany, Belgium, The Netherlands, England, France,

Switzerland, Italy, Canada, Mexico, Japan, and Korea for engaging in cartel activity, resulting in heavy fines and, in some cases, imprisonment. In FYs 1999 and 2000, six foreign nationals were sentenced to serve time in U.S. prisons for antitrust offenses. Just last month, the United States entered into a plea agreement in which, for the first time ever, a Japanese executive has agreed to face a possible jail sentence for a violation of U.S. antitrust law.

B. Individuals Pay A Heavy Price When Their Companies Don't Provide Timely Cooperation

In order to properly "incentivise" the Amnesty Program, and timely cooperation in general, the Division has adopted a number of policies aimed at the treatment of companies and their executives who do not provide timely cooperation. Again, while the consequences of these policies may not fit neatly into a company's financial cost/benefit analysis in deciding whether or not to seek corporate amnesty or to provide timely cooperation, the fate of the company's executives ought to be front and center in assessing what is in the best overall interest of the company's welfare.

1. The Division's "Carve-Out" Policy.

Companies that come forward too late in the investigation risk more than a heavier fine -- while the Division will negotiate a corporate disposition (which may require a mid- to upper-end Guidelines fine), the culpable officers, directors, and employees will be carved out of the non-prosecution protection of the plea agreement. Individuals who are carved out of the plea agreement will then have to negotiate separate plea agreements or be subject to indictment. This policy is meant to, and does, take a serious toll on the companies and their executives.

The sorbates investigation provides an example of the impact of this policy. The sorbates investigation uncovered a

seventeen-year international price-fixing conspiracy in the food preservatives industry. To date, the investigation has produced cases against five corporate defendants and nine individuals and resulted in over $130 million in criminal fines. Daicel Chemical Industries Ltd. (Daicel) and Ueno Fine Chemicals Industry Ltd. (Ueno), two Japanese firms, were the last two companies to plead guilty in the investigation. Daicel paid a $53 million fine, and Ueno has been sentenced to pay an $11 million fine.

Perhaps of more significance than the corporate fines, four current top executives from both Daicel and Ueno were carved out of the non-prosecution protection of the corporate agreements. Seven of those executives were indicted, including a Managing Director from Daicel and a member of Ueno's Board of Directors, and are now international fugitives. As such, they could be arrested, detained, and held for trial if they travel to or through the United States or one of its territories. In addition, they could be arrested, detained, extradited to the United States, and held for trial if they travel to or through any one of a host of countries with which the United States has an extradition treaty covering antitrust crimes. If jurisdiction is obtained over any of these individuals and they are convicted, then they will each face the serious prospect of a lengthy jail sentence. While they may ultimately escape U.S. jurisdiction and the inside of a prison cell, they will forever be looking over their shoulders, unable to regain their lives as international businesspeople, and forever marked as international fugitives.

Of course, the carve-out policy also takes an enormous toll on the company, which can find its senior management left in shambles. Imagine, as was the case in the matters described above, having key members of your senior management -- individuals who are the face and link of the company to its customers -- indicted and labeled as international fugitives. What is the impact on a multi-

national company when these individuals can no longer travel to serve those customers or even to visit a company's facilities in the United States or elsewhere? Companies who wait too long to come forward and cooperate will find that when the time comes, it may be very difficult to put the matter behind them.

2. Restricting The Use Of No-Jail Deals

Because of the frequent problems we face in obtaining jurisdiction over foreign nationals living abroad, multi-national companies and their foreign executives often have a unique, but limited, opportunity. Foreign executives who come forward (with or without the company) and provide timely cooperation often can leverage their jurisdictional advantage to secure either immunity or a plea agreement with a "no-jail deal." However, the window of opportunity for this offer is limited. If a U.S. individual co-conspirator of equal or lesser culpability has either entered into a plea agreement calling for jail time or has been sentenced to jail time, we will not consider a no-jail deal for foreign national, regardless of how remote the chances are of ever obtaining jurisdiction over that individual.

Moreover, regardless of whether a U.S. executive has agreed to or has been sentenced to jail time, foreign nationals who don't provide timely cooperation that can advance the investigation will still not be considered for no-jail deals. Obviously, what constitutes timely and valuable cooperation will depend entirely on the circumstances of the investigation. So, in some cases, an amnesty applicant may provide sufficient information to remove the possibility of a no-jail deal for the executives of a company that is second in the door. In other cases, where the evidence is not as developed, no-jail deals may be available deeper into the investigation.

The Division's policies on no-jail deals for foreign nationals also affect U.S. corporations and individuals who are potential targets in international cartel investigations. Counsel representing these targets must be aware of the pressing incentives for foreign companies and executives to come forward early and cooperate while the opportunity for amnesty or no-jail deals exist and may want to consider getting in to see the Division first. While a U.S. executive does not have the same jurisdictional shield to leverage his offer of cooperation, timely cooperation will always be generously rewarded.

The "no-jail deal" and "carve out" policies will hopefully provide companies and individuals with clear and distinct alternatives. Companies and their culpable executives should expect that, if they do not provide timely cooperation, the executives will be carved out of any corporate plea resolution. Moreover, the individuals should understand that any subsequent plea disposition with the Division would have to include a jail component. If no deal can be reached, then the individuals will be indicted.

The Division understands, of course, that in many cases our insistence on jail time will result in no possibility of a plea agreement resolution and the indictment of the foreign defendant. For that reason, corporate and individual counsel routinely approach the Division with lucrative offers to pay heavy corporate and individual fines in exchange for no-jail deals for the key executives. In support of these offers, counsel will often argue that the conviction and fine are better than "an empty indictment." However, that is clearly not the case for a law enforcement authority whose interest is deterrence. As discussed above, the stigma and uncertainty of being an international fugitive is a far greater deterrent than a no-jail conviction, no matter the amount of the individual fine.

3. Rejecting The Cultural Immunity Defense

As discussed above, under certain circumstances, the Division may make concessions when it can not obtain personal jurisdiction over a foreign national. When a foreign national provides timely cooperation, that could mean a no-jail deal or even immunity. When cooperation by the foreign national is not timely, it may simply mean a shorter jail sentence than would otherwise be warranted absent the jurisdictional shield. However, the Division will not mitigate a foreign national's sentence or make other concessions based on a "cultural immunity" defense.

In pre-indictment "pitch" meetings for foreign nationals, the Division is frequently asked to take into consideration the following arguments in exercising its prosecutorial discretion: (1) the individual could not be prosecuted criminally for the cartel activity under the laws of the country where he/she resides; and (2) even if the conduct would violate the criminal, civil, or administrative laws of the defendant's home country, the cartel activity is still a culturally accepted way of doing business there. Neither argument will be given any credit by the Division. First, regardless of the cultural or legal norms in the defendant's home country, the foreign nationals we have prosecuted, without fail, were fully aware that their conduct violated U.S. antitrust laws, and they still targeted U.S. businesses and consumers as part of their fraudulent schemes. In fact, in most cases, cartel members go to great lengths to conceal their conduct by avoiding meeting in the United States or by not involving U.S. employees, while continuing to target the U.S. market. Second, even assuming cartel activity is culturally accepted abroad, where it adversely impacts U.S. consumers, the Division has an obligation to deter such conduct not reinforce it with lenient treatment.

C. The Amnesty Program's Biggest Reward

The promise of immunity for officers, directors and employees who come forward with the company and cooperate will often be the Amnesty Program's biggest reward. While this is certainly demonstrated in the incarceration statistics cited above, concrete examples from two recent investigations may make this point even clearer.[8]

- **Graphite Electrodes.** Compare the fate of the executives from the two U.S. companies involved in the graphite electrode conspiracy. The Carbide/Graphite Group, Inc. obtained corporate amnesty, and so *all* of its officers, directors, and employees received full non-prosecution protection for any crimes committed in connection with the antitrust conspiracy. UCAR International, on the other hand, did not come forward and offer its cooperation until after the search warrants were executed and one other company had agreed to plead guilty and cooperate. Three of UCAR's top executives were carved out of the non-prosecution protection of its plea agreement and were subsequently charged. UCAR' s president was convicted and sentenced to serve 17 months in jail *and* to pay a $1.25 million individual fine (the second largest individual antitrust fine ever imposed).[9] UCAR's vice-president was also convicted and sentenced to serve 9 months in jail

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[8] As noted above, the amnesty applicants in these examples have already publicly announced their acceptance into the Amnesty Program.

[9] The highest antitrust fine ever imposed against an individual is $10 million. It was obtained against the president of a German company in this same investigation.

- *and* to pay a $1 million individual fine (the third largest individual antitrust fine ever imposed). The third UCAR executive carved out of the corporate plea agreement was indicted and remains at large as an international fugitive.

- **Vitamins**. The second example compares the treatment of the executives from the three foreign companies involved in the worldwide vitamin cartel. Rhône-Poulenc obtained corporate amnesty, and *all* of its officers, directors, and employees in the United States and abroad received full non-prosecution protection for any crimes committed in connection with the antitrust conspiracy. F. Hoffmann-La Roche (HLR) and BASF AG, on the other hand, did not offer their cooperation until after they heard the bad news from Rhône-Poulenc. Four employees from both HLR and BASF were carved out of the non-prosecution protection of the corporate plea agreements. To date, six of these employees, all foreign nationals (three each from HLR and BASF), have been charged and have pleaded guilty. All six defendants submitted to U.S. jurisdiction, paid heavy fines, and served time in U.S. prisons.

D. Who Is Looking Out For The Best Interests Of The Individuals?

In light of the tremendous impact that a company's decision whether to seek corporate amnesty can have on its officers, directors, and employees, it is fair to ask (1) whether it is possible to quantify the potential rewards and consequences as they relate to individuals with exposure, and (2) who is looking out for the best interests of those individuals. Some of the commentary from the private bar on the pros and cons of pursuing corporate amnesty seems to be reduced to a cost/benefit analysis where the risks and benefits are measured in dollars and cents. However, as

explained above, monetary cost savings may not be the most important consideration when the freedom of individuals is hanging in the balance. If the company is more concerned about the financial consequences of a decision to self report than it is about the fate of its executives with culpability, then the interests of the company and those individuals are almost assuredly in conflict. If that is the case, who is looking out for the best interests of those individuals?

If company counsel claims to represent company employees with potential criminal exposure then, once a decision has been made not to seek corporate amnesty (or should corporate amnesty be denied), does counsel not have an ethical obligation to: (1) advise those individuals of the nature of the potential conflict that exists between the company and the individuals; (2) inform individuals of the need to seek separate counsel to advise them on the conflict and future representation; or (3) obtain informed consent (assuming such consent is even possible) before engaging in further representation of the individuals; and (4) if dual representation continues, advise those individuals of *their* personal alternatives, including the possibility of seeking amnesty personally, irrespective of what the company does, under the Division's Individual Leniency Policy?

If company counsel does not claim to represent company employees with potential criminal exposure then, once a decision has been made not to seek corporate amnesty (or should corporate amnesty be denied), does counsel not have an ethical obligation to: (1) advise those individuals that he/she does not represent them; (2) advise those individuals of the potentially adverse positions of the company and the individual employees; and (3) advise them of the right (or need) to consult with counsel of their own choosing?

These are serious ethical dilemmas for the company and its counsel. In a number of recent pre-indictment "pitch" meetings, the Division has heard from independent counsel

representing foreign nationals that they were brought belatedly into the investigation when it was already too late to save the individual from indictment and incarceration, if convicted. These attorneys have urged us not to hold the foreign individual responsible for what they claim was, in essence, a corporate decision not to provide timely cooperation. In support of this argument, they have claimed: (1) the individuals were not separately represented until too late in the process and so were never adequately advised as to the personal consequences of not providing timely cooperation; and (2) it would have been unthinkable by the prevailing cultural norms to believe that the individuals could have elected to cooperate without the company's concurrence. As to the first argument, the fact that company counsel may have labored under a conflict of interest will rarely, under these circumstances, be seen as a factor in mitigation for the individual. As for the second argument, to the extent such norms exists, the Division will not credit this sort of "cultural immunity" defense and will direct its enforcement efforts to dispel, rather than reward, their continued observance. Foreign-based companies, just like their U.S. counterparts, need to be aware that, if they choose not to take advantage of the Corporate Amnesty Program, they leave themselves vulnerable to executives who may go it alone under the Individual Leniency Program in order to protect their personal interests.

IV. Conclusion

Particularly in international cases where we face jurisdictional hurdles, it is critical that there be big incentives for companies and their executives to come forward and cooperate and, conversely, big adverse consequences for companies and their executives that elect to hunker down and hope that we never make our case. By being vigilant in adhering to the policies described above, we can present a company and its executives with two clear and distinct paths

from which to choose. It's critical that the company then make the right choice. Because, with the freedom of its executives potentially on the line, what is at stake can not be measured on a balance sheet.

APPENDIX P

U.S. Department of Justice

Antitrust Division

Philadelphia Offic

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April 8, 2003

Express Mail

John M. Nannes, Esquire
Skadden, Arps, Slate, Meagher & Flom LLP
1440 New York Avenue, N.W.
Washington, DC 20005-2111

Re: Stolt-Nielsen Transportation Group, Ltd.

Dear Mr. Nannes:

I am writing to confirm our telephone conversation of April 8, 2003, in which I informed you that the Antitrust Division of the United States Department of Justice is considering whether to withdraw the conditional leniency granted on January 15, 2003, to your client Stolt-Nielsen Transportation Group Ltd. (Bermuda) (hereinafter SNTG). The grant of conditional leniency was based, *inter alia,* on SNTG's representation that in or about March 2002 it "took prompt and effective action to terminate its part in the

anticompetitive activity being reported upon discovery of the activity."[10]

The Antitrust Division has received specific credible evidence that SNTG did not terminate its part in the illegal activity in or about March 2002, and that in fact it continued its illegal activities until at least as late as the second half of 2002. If further investigation substantiates that SNTG did not terminate its part in the conspiracy as it represented when seeking leniency, the Antitrust Division intends to withdraw the conditional leniency granted to SNTG.

Accordingly, we are hereby suspending all obligations of SNTG to cooperate under the terms of the conditional leniency letter. Enclosed is a subpoena *duces tecum* to SNTG for documents relating to the investigation. Further, the interview of Philip Fecher pursuant to the conditional leniency letter is cancelled. Also enclosed is a subpoena for Mr. Fecher. In light of the present circumstances, it is the Division's position that Mr. Fecher should obtain separate counsel. We agree to postpone his appearance until he has had an opportunity to consult with new counsel. We also withdraw our request to interview Stephen White.

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[10] Conditional Leniency Letter, dated January 15, 2003, to John M. Nannes, Esquire from James M. Griffin, Deputy Assistant Attorney General. January 15, 2003, Paragraph 1(a).

Before the Division makes a final determination in this matter, STNG will have an opportunity to present its position to James M. Griffin, Deputy Assistant Attorney General.

Sincerely yours,

/s/ Robert E. Connolly
ROBERT E. CONNOLLY
Chief
Philadelphia Office
Antitrust Division

Enclosures

(6)

Supreme Court, U.S.
FILED
SEP 20 2006
OFFICE OF THE CLERK

No. 06-97

In the Supreme Court of the United States

STOLT-NIELSEN, S.A., ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals correctly held that petitioners must seek enforcement of their conditional leniency agreement with the government in post-indictment rather than pre-indictment proceedings.

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STOLT-NIELSEN, S.A., ET AL., PETITIONERS

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinions of the court of appeals (Pet. App. 1a-21a, 22a-25a) are reported at 442 F.3d 177. The memorandum order of the district court (Pet. App. 34a-64a) is reported at 352 F. Supp. 2d 553.

JURISDICTION

The judgment of the court of appeals was entered on March 23, 2006. A petition for rehearing was denied on June 20, 2006 (Pet. App. 30a-31a). The petition for a writ of certiorari was filed on July 20, 2006. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioners filed separate civil actions requesting, *inter alia*, an injunction barring the government from obtaining an indictment against petitioners for engaging

in collusive activity in the parcel tanker shipping services market. The district court enjoined the government from obtaining an indictment against petitioners for the collusive activity. Pet. App. 34a-64a. The court of appeals reversed and remanded. *Id.* at 1a-21a, 22a-25a.

1. In November 2002, the Antitrust Division of the Department of Justice (the Division) began investigating possible collusion in the parcel tanker shipping industry, which provides worldwide transportation of bulk liquid chemicals and other speciality liquids. Pet. App. 5a, 53a-56a. Petitioner Stolt-Nielsen, S.A., through its subsidiary, petitioner Stolt-Nielsen Transportation Group Ltd. (collectively SNTG), is one of the leading suppliers of parcel tanker shipping services. *Id.* at 4a. When the Division began its investigation, petitioner Richard B. Wingfield was Managing Director of Tanker Trading for SNTG. *Id.* at 4a, 8a. The Division's investigation was prompted by an article published in the *Wall Street Journal* reporting that SNTG was being sued by Paul O'Brien, its former general counsel. According to the article, O'Brien had alleged in his complaint that SNTG had been engaged in illegal collusive activity. *Id.* at 4a.

On November 22, 2002, SNTG contacted the Division about applying for leniency pursuant to the Division's Corporate Leniency Policy. Pet. App. 5a, 55a, 72a-75a. Under that policy, the Division agrees not to prosecute companies that report their illegal antitrust activity to the Division at an early stage, if certain qualifying conditions are satisfied. *Id.* at 5a; see *id.* at 72a-75a. On January 15, 2003, the Division and SNTG executed a conditional leniency agreement (the Agreement). *Id.* at 65a-71a.

The Agreement specified that it was "conditional and depend[ed] upon SNTG satisfying the conditions set forth" therein. Pet. App. 65a. SNTG represented in the Agreement that it had taken "prompt and effective action to terminate its part in the anticompetitive activity being reported upon discovery of the activity." *Id.* at 66a. SNTG's representations were expressly made "[s]ubject to verification" by the Division. *Id.* at 67a. SNTG also pledged, *inter alia*, to provide "a full exposition of all facts known to SNTG relating to the anticompetitive activity being reported." *Id.* at 66a.

The Division, in return, "agree[d] conditionally to accept SNTG into * * * the Corporate Leniency Program," pursuant to which the Division "agree[d] not to bring any criminal prosecution against SNTG for any act or offense committed prior to the date of [the Agreement] in connection with the anticompetitive activity being reported." Pet. App. 67a-68a. The Agreement expressly provided that, "[i]f the Antitrust Division at any time determines that SNTG has violated th[e] Agreement, th[e] Agreement shall be void," and the Division could then revoke SNTG's "conditional acceptance" into the Leniency Program and "*thereafter initiate a criminal prosecution against SNTG, without limitation.*" *Id.* at 68a (emphasis added).

In the weeks that followed the execution of the Agreement, the Division received evidence that SNTG had made false representations in the Agreement and had breached its duty to cooperate. The evidence indicated that, contrary to SNTG's representation that it had taken "prompt and effective action to terminate its part in the anticompetitive activity being reported upon discovery of the activity," Pet. App. 66a, SNTG in fact had continued to engage in collusive activity for several

months after SNTG's former general counsel had informed the company about SNTG's unlawful collusive trading practices. *Id.* at 8a, 157a-158a. On April 8, 2003, in light of that information, the Division suspended SNTG's obligations under the Agreement and notified SNTG that the Division was considering withdrawing the grant of conditional leniency. *Id.* at 157a-159a. On March 2, 2004, the Division withdrew its grant of conditional leniency. *Id.* at 8a.

2. In February 2004, SNTG and Wingfield filed actions in the United States District Court for the Eastern District of Pennsylvania, alleging that the Agreement prohibited the Division from obtaining an indictment against them. The complaints sought preliminary and permanent injunctive relief enjoining the Division from obtaining an indictment. Pet. App. 9a, 42a-43a.

On January 14, 2005, the district court permanently enjoined the government "from indicting or prosecuting [SNTG and Wingfield] for any violations of the Sherman Act, 15 U.S.C. § 1, up to and including January 15, 2003, in the parcel tanker industry." Pet. App. 51a; see *id.* at 34a-50a. The court rejected the government's argument that SNTG was not entitled to a pre-indictment judicial determination of its rights under the Agreement, and that SNTG instead should assert the Agreement as a defense in post-indictment proceedings. In the court's view, "if an indictment were later determined to have been wrongfully secured, it would be too late to prevent the irreparable consequence[]" of damage to SNTG's reputation. *Id.* at 45a & n.8. The court then concluded that the government should be enjoined from obtaining an indictment. *Id.* at 47a-50a.

3. The court of appeals reversed. Pet. App. 1a-21a, 22a-25a. The court concluded that "[s]eparation-of-

power concerns * * * counsel against using the extraordinary remedy of enjoining the Government from filing the indictments." *Id.* at 20a. Although there is a "narrow exception to this rule" when "the very act of filing an indictment" "may chill constitutional rights," the court explained, "this case does not implicate that concern." *Id.* at 20a, 23a. The court therefore was "guided by other cases" in which non-prosecution agreements have been construed "not [to] form the basis for enjoining indictments before they issue." *Id.* at 20a. Rather, the court reasoned, "immunity agreements that have promised not to charge or otherwise criminally prosecute a defendant, like the agreement at issue in this case, have * * * been construed to protect the defendant against conviction rather than indictment and trial." *Id.* at 14a.

That distinction, the court explained, "is grounded in the understanding that simply being indicted and forced to stand trial is not generally an injury for constitutional purposes but is rather 'one of the painful obligations of citizenship.'" Pet. App. 15a (quoting *Cobbledick* v. *United States*, 309 U.S. 323, 325 (1940)). Observing that an injunction normally is available only when there is no adequate legal remedy, the court explained that petitioners could "interpose the Agreement (as a defense to conviction) in a pre-trial motion," which is a "practical and efficient—and indeed complete—legal remedy." *Id.* at 19a-20a. The court therefore held that the district court "lacked authority to employ the extraordinary remedy of enjoining the Government's indictments of [SNTG] and Wingfield." *Id.* at 21a.

4. On July 20, 2006, petitioners filed with Justice Souter an application to recall and stay the mandate of the court of appeals pending this Court's disposition of

the petition for a writ of certiorari. On July 25, 2006, Justice Souter denied the application. The same day, petitioners re-filed the application with Justice Stevens, who, on August 2, 2006, referred the application to the full Court. On August 21, 2006, the Court denied petitioners' application. On September 6, 2006, a federal grand jury in the Eastern District of Pennsylvania returned an indictment charging petitioners with engaging in a combination and conspiracy to suppress competition in the parcel tanker shipping industry, in violation of 15 U.S.C. 1.

ARGUMENT

Petitioners contend (Pet. 10-11) that the Third Circuit's decision that federal courts generally cannot enjoin a federal indictment to enforce a non-prosecution agreement conflicts with the law in the Seventh Circuit. That contention lacks merit and does not warrant review.

1. The petition should be denied for the threshold reason that the claim it makes is now moot. See, *e.g.*, *Spencer* v. *Kemna*, 523 U.S. 1 (1998). Petitioners filed an action asserting that the Agreement prohibited the government from obtaining an indictment against them, and they accordingly sought an injunction barring the government from obtaining an indictment. The district court granted a permanent injunction. Pet. App. 51a. The court of appeals reversed, holding that petitioners have no entitlement under the Agreement to an injunction barring the government from obtaining an indictment against them, and that petitioners instead should assert the Agreement as a defense in post-indictment, pre-trial, proceedings. *Id.* at 19a.

The petition seeks this Court's review of whether "courts have the authority to determine the enforceability of non-prosecution agreements prior to indictment." Pet. 20. The petition makes clear throughout that the issue petitioners seek to raise is whether they are entitled to *pre*-indictment relief in the form of an injunction barring the government from obtaining an indictment against them. See Pet. 12-29. Petitioners contend that they have "a bargained-for interest in avoiding not only conviction, but indictment." Pet. 19.

After this Court denied petitioners' application for a stay and recall of the court of appeals' mandate, a federal grand jury returned an indictment against petitioners. Because the petition seeks this Court's review of whether petitioners were entitled to an injunction barring the government from obtaining an indictment against them, and because petitioners have now been indicted, the issue raised by the petition is moot. Additionally, there could be no basis for concluding that the issue raised by the petition is "capable of repetition, yet evading review." See, *e.g.*, *Kemna*, 523 U.S. at 17. That exception applies only if, *inter alia*, there is a "reasonable expectation that the same complaining party [will] be subject to the same action again." *Ibid.* (citation omitted) (alteration in original). There is no reasonable expectation that petitioners will again be indicted for the anticompetitive conduct encompassed by the indictment, or that the issue of petitioners' entitlement under the Agreement to an injunction barring their indictment will again be presented.

Even assuming, *arguendo*, that petitioners' indictment fails to render the petition moot, the fact of the indictment weighs strongly against granting certiorari. In light of petitioners' indictment, there is no longer any

practical significance to the issue whether petitioners are entitled to an injunction barring the government from obtaining an indictment against them. Petitioners, as the court of appeals explained, can now assert the Agreement as a defense in post-indictment, pre-trial proceedings.

2. Even apart from mootness considerations, certiorari should be denied. The court of appeals correctly determined that courts should not grant the extraordinary remedy of an injunction against a grand jury indictment based on petitioner's claim under a non-prosecution agreement.

a. The court of appeals' decision is fully consistent with prior decisions of this Court and other courts of appeals. Petitioners fail to cite any case in which a court has enjoined the federal government from obtaining an indictment against the target of an ongoing federal criminal investigation. See *Deaver* v. *Seymour*, 822 F.2d 66, 69-70 (D.C. Cir. 1987) (finding "no case" in which "a federal court [has] enjoined a federal prosecutor's investigation or presentment of an indictment," and observing that "subjects of federal investigation have never gained injunctive relief against federal prosecutors"); cf. *id.* at 68 (noting that this Court "in certain cases" has "permitted federal courts to issue injunctions against *state* court criminal proceedings that threatened federal constitutional rights").

Contrary to petitioners' argument (Pet. 12-16), the court of appeals' decision does not conflict with the Seventh Circuit's decision in *United States* v. *Meyer*, 157 F.3d 1067 (1998), cert. denied, 526 U.S. 1070 (1999). In that case, the defendant argued that his due process rights had been violated when the government re-indicted him without seeking a pre-indictment determina-

tion that he had breached an immunity agreement. The agreement "provided that, in exchange for [the defendant's] performance, the government would dismiss the charge currently pending against him and would not charge him with any other violations relating to the same criminal conspiracy or with other drug or money laundering violations." *Id.* at 1077.

The Seventh Circuit rejected the defendant's argument that he was entitled to a pre-indictment determination of breach instead of the post-indictment determination he had received. The court explained that "the benefit of [the defendant's] bargain" was "to avoid the risk of conviction"—not the risk of indictment—and that the post-indictment (but pre-trial) determination therefore had given him "all of the protection demanded by due process." *Meyer*, 157 F.3d at 1077. Although the court indicated in *dictum* that the "preferred procedure" would be for the government to seek a pre-indictment determination of whether a defendant has breached an immunity agreement, *ibid.*, the court made no suggestion of a *requirement* to seek a pre-indictment determination, much less that it could be appropriate to enjoin the government from obtaining an indictment. To the contrary, the court rejected the defendant's argument that he was entitled to a pre-indictment determination.[1]

As the court of appeals explained, Pet. App. 13a-14a, 24a, its decision is fully consistent with the Seventh Circuit's decision in *Meyer*. As in *Meyer*, the court of appeals here rejected petitioners' contention that they are

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[1] Accord *United States* v. *Attaya*, 864 F.2d 1324, 1330 n.9 (7th Cir. 1988) (observing that a pre-indictment hearing may be preferable absent "good cause for immediate reindictment," but acknowledging that "a pre-indictment hearing is not a constitutional requirement").

entitled to a pre-indictment determination of whether they breached the Agreement. The court instead held, consistent with *Meyer*, that the Agreement protects petitioners against conviction rather than against indictment, and that petitioners accordingly can assert the Agreement as a defense in post-indictment proceedings. *Id.* at 14a-15a, 19a-20a.

b. As the court of appeals explained, Pet. App. 14a-15a, 20a, no court has held that a party to an agreement like the one in this case holds any entitlement to an injunction barring indictment. Indeed, petitioners have cited no case in which a federal court has held that any immunity, leniency, or non-prosecution agreement, regardless of its particular wording, granted a right to have a court enjoin the government from obtaining an indictment or furnished a basis for a court to do so.[2]

This Court, nearly one century ago, construed an immunity statute providing that "[n]o person shall be prosecuted [for any conduct] * * * concerning which he may testify." *Heike* v. *United States*, 217 U.S. 423, 431 (1910). The Court concluded that the provision conferred immunity only "as a defense" to "successful prosecution," not an absolute immunity from standing trial. *Ibid.* The Agreement in this case similarly set forth that "the Antitrust Division agrees not to bring any criminal

[2] Petitioners incorrectly suggest (Pet. 28-29) that *United States* v. *Minnesota Mining & Manufacturing Co.*, 551 F.2d 1106, 1111-1112 (8th Cir. 1977), held that the non-prosecution agreement at issue in that case granted a right not to be indicted. But that case involved a *post*-indictment challenge, not a pre-indictment challenge. The Eighth Circuit merely held that, because "the defendants fully discharged their obligations under the agreement, the Government [was] bound to fulfill its responsibility" not to prosecute. *Id.* at 1111 (footnote omitted). The court of appeals' decision in this case permits petitioners to seek a similar resolution in post-indictment proceedings. See Pet. App. 21a n.7.

prosecution against SNTG." Pet. App. 68a. Such agreements have uniformly been construed to provide a defense to successful prosecution rather than an absolute immunity from indictment. *Id.* at 14a; see, *e.g.*, *United States* v. *Bailey*, 34 F.3d 683, 690-691 (8th Cir. 1994); *United States* v. *Gerant*, 995 F.2d 505, 509 (4th Cir. 1993); *Meyer*, 157 F.3d at 1071, 1077; *United States* v. *Bird*, 709 F.2d 388, 392 (5th Cir. 1983).

Petitioners identify nothing in the Agreement at issue in this case that could justify departing from the general rule. To the contrary, the Agreement makes explicit that, "[i]f the Antitrust Division at any time determines that SNTG has violated this Agreement," the "Agreement shall be void" and the "Division may revoke the conditional acceptance of SNTG into the Corporate Leniency Program," in which event the "Division may * * * *initiate a criminal prosecution against SNTG, without limitation.*" Pet. App. 68a (emphasis added). That language expressly reinforces that, if the Division determines that SNTG has violated the Agreement, the Agreement affords no protection against initiating a prosecution by means of indictment. Petitioners' contention that they have a right under the Agreement to insist upon pre-indictment judicial review is particularly without merit because the Agreement expressly preserves the Division's right to proceed in the first instance based on its *own* determination of a violation, with no suggestion of any requirement for a prior judicial determination. See *United States* v. *Verrusio*, 803 F.2d 885, 889-890 n.3 (7th Cir. 1986) (if a non-prosecution agreement "does not require the government to follow a particular procedure in the event that it believes [the defendant] breached his obligations," the court "will not 'imply as a matter of law a term which the parties

themselves did not agree upon'") (quoting *United States* v. *Benchimol*, 471 U.S. 453, 456 (1985) (per curiam)).

Because an agreement like the one at issue here affords no entitlement to avoid an indictment, the proper means of enforcing such an agreement is by invoking it pre-trial as a defense to conviction and moving to have the indictment dismissed and the prosecution terminated, not by seeking to enjoin the government from obtaining an indictment in the first place. See Pet. App. 19a-20a. That conclusion is fortified by the recognition that "[s]eparation-of-power[s] concerns * * * counsel against using the extraordinary remedy of enjoining the Government from filing * * * indictments," especially, as here, in the absence of any claim that "the very act of filing an indictment" "may chill constitutional rights." *Id.* at 20a, 24a; see *United States* v. *Nixon*, 418 U.S. 683, 693 (1974) (observing that "the Executive Branch has exclusive authority and absolute discretion to decide whether to prosecute a case"); *United States* v. *Cox*, 342 F.2d 167, 171 (5th Cir.) (en banc) ("It follows, as an incident of the constitutional separation of powers, that the courts are not to interfere with the free exercise of the discretionary powers of the attorneys of the United States in their control over criminal prosecutions."), cert. denied, 381 U.S. 935 (1965).

c. Petitioners err in relying (Pet. 23-25) on this Court's decisions in *Hynes* v. *Grimes Packing Co.*, 337 U.S. 86 (1949), and *Truax* v. *Raich*, 239 U.S. 33 (1915). Those decisions, contrary to petitioner's characterization, do not hold that courts generally may enjoin the government from obtaining an indictment whenever an indictment might adversely affect the property interests of the potential defendant. See Pet. 24. The decisions involved the particular context of a facial, pre-enforce-

ment challenge to the validity of a federal regulation (*Hynes*) and a state law (*Truax*). Although the Court observed that an injunction against enforcement of the laws was warranted when essential to protecting property rights, see *Hynes*, 337 U.S. at 98-99; *Truax*, 239 U.S. at 38-39, the Court did not purport generally to sanction the entry of an injunction barring a prosecutor from obtaining an indictment against the target of an ongoing investigation.

Rather, those cases involved circumstances in which the Court determined that, because the subjects of the challenged laws would be chilled from risking violation of the laws, there was no practical opportunity to raise a post-enforcement challenge "in an ordinary criminal proceeding." *Hynes*, 337 U.S. at 99; see *Truax*, 239 U.S. at 37-39. The Court therefore approved a pre-enforcement action for an injunction against enforcement of the allegedly invalid laws at issue on the basis that affected individuals would have no adequate legal remedy. *Hynes*, 337 U.S. at 99; *Truax*, 239 U.S. at 39; see Pet. App. 23a. Here, by contrast, as in any case raising the question of the enforceability of a non-prosecution or immunity agreement, petitioners "have a practical and efficient—and indeed complete—legal remedy available to them, *i.e.*, access to a federal forum post-indictment in which they may assert the Agreement as a defense." *Id.* at 20a. In such circumstances, nothing in *Hynes* or *Truax* supports enjoining the government from obtaining an indictment. See, *e.g.*, *Douglas* v. *City of Jeannette*, 319 U.S. 157, 163 (1943) (noting "familiar rule that courts of equity do not ordinarily restrain criminal prosecutions" because lawfulness of prosecution "may be determined as readily in the criminal case" itself "as in a suit for an injunction").

d. Finally, the court of appeals' conclusion that petitioners must enforce the Agreement in post-indictment rather than pre-indictment proceedings is consistent with this Court's recognition of the "possibility that any citizen, no matter how innocent, may be subjected to a * * * criminal prosecution and put to the expense of defending himself." *Heike*, 217 U.S. at 432. As the Court has explained, "[b]earing the discomfiture and cost of a prosecution for crime even by an innocent person is one of the painful obligations of citizenship." *Cobbledick* v. *United States*, 309 U.S. 323, 325 (1940); see *Deaver*, 822 F.2d at 69 ("Although it is surely true that an innocent person may suffer great harm to his reputation and property by being erroneously accused of a crime, all citizens must submit to a criminal prosecution brought in good faith so that larger societal interests may be preserved."). The Agreement, by specifying that the "Division may * * * initiate a criminal prosecution against SNTG, without limitation" upon "determin[ing] that SNTG has violated [the] Agreement," Pet. App. 68a, makes clear that petitioners possessed no special entitlement to avoid criminal prosecution.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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Supreme Court of the United States

STOLT-NIELSEN S.A.,
STOLT-NIELSEN TRANSPORTATION GROUP LTD.,
AND RICHARD B. WINGFIELD,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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RULE 29.6 STATEMENT

Pursuant to Rule 29.6 of this Court's rules, Petitioner Stolt-Nielsen Transportation Group Ltd. states that all of its stock is owned by its parent corporation, Petitioner Stolt-Nielsen S.A., a publicly held corporation. Petitioner Stolt-Nielsen S.A. states that it does not have any parent corporation and that no publicly held company owns more than 10% of its stock.

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As established in the petition and the host of *amicus curiae* briefs supporting a writ of certiorari, there are compelling reasons warranting this Court's review of this case. Most critically, the Third Circuit decision creates an irreconcilable circuit conflict on an important constitutional issue under the Separation of Powers. Nothing in the Brief in Opposition detracts from the compelling reasons warranting this Court's review.

First, the petition is not moot in any sense, legal or practical. This Court retains the power to provide effective relief to Stolt-Nielsen and Wingfield, notwithstanding the Antitrust Division's precipitous indictment of them during the pendency of the petition before this Court. Indeed, both sides continue to have definite stakes in the outcome here, the foremost being that reversal in this Court would restore the district court's findings that Stolt-Nielsen and Wingfield did *not* breach the Amnesty Agreement and are entitled to the Agreement's protections. That outcome would promptly relieve Stolt-Nielsen and Wingfield (as well as the district court) of the pending criminal case, as well as other threatened prosecutions.

Second, the Opposition ignores the indisputable point that the Seventh Circuit holds that pre-indictment determinations of alleged breaches of non-prosecution agreements are constitutionally *permissible* while the Third Circuit holds that such determinations are constitutionally *impermissible* as violative of the Separation of Powers. That doctrinal conflict leads inexorably to the conclusion that this case would have had the opposite outcome had it originated in the Seventh Circuit. Indeed, the circuit conflict here is not merely some post-hoc rationale for certiorari: the district court here hinged its injunction expressly on the Seventh Circuit's rule, while the Third Circuit reversed that injunction on the basis of its own contrary rule.

Third, no precedents of this Court or any other court support the Third Circuit's holding that federal courts are powerless to prevent prosecutions that violate constitutional rights.

STATEMENT

The Opposition is at least as notable for what it *does not* dispute as for what it *does* dispute. The Opposition does not dispute that the Antitrust Division has consistently publicized that its Amnesty Program provides complete immunity from criminal prosecution, including indictment. Pet. 2-3. The Opposition does not dispute that the Division purposefully and expressly relinquished its prosecutorial discretion in the Amnesty Program. Pet. 3. The Opposition does not dispute that the Division contractually promised in the Amnesty Agreement "not to bring any criminal prosecution" against Stolt-Nielsen and its directors, officers, and employees. Pet. 4-5. And the Opposition does not dispute that Stolt-Nielsen provided the Antitrust Division with the "smoking gun" evidence that enabled the Division to successfully prosecute the co-conspirators. Pet. 5-6.

Where it does address the facts, the Opposition largely obfuscates them. For example, the Opposition creates the misleading impression that the Antitrust Division began investigating possible collusion well before Stolt-Nielsen contacted the Division about applying for amnesty. Opp. 2. In fact, the district court found, based on the uncontested testimony of the Division's own Deputy Assistant Attorney General, that the Division began its investigation on the very same day that Stolt-Nielsen contacted the Division. Pet. App. 56a (¶ 26). Most critically, however, regardless of when Stolt-Nielsen contacted the Division and when the Division opened its investigation, the Division obviously saw fit to enter into the Amnesty Agreement with Stolt-Nielsen and thus must be bound by its terms.

Furthermore, the Opposition obscures that the Division had ample opportunity to conduct its verification of Stolt-Nielsen's "prompt and effective action" representation — and in fact *did conduct* its own investigation (Pet. App. 57a (¶ 41)) — before accepting the "smoking gun" evidence from Stolt-Nielsen. It was only *after* receiving that "smoking gun" evidence that the Division suddenly and belatedly attempted to revoke Stolt-Nielsen's amnesty on the basis of a supposed misrepresentation.

By stringing together selected excerpts of the Amnesty Agreement, the Opposition also confuses some of the Agreement's crucial provisions. Contrary to the Opposition's suggestion (Opp. 3-4), the Agreement provides that the Division may revoke Stolt-Nielsen's acceptance in the Amnesty Program only if Stolt-Nielsen "has violated" one of the continuing obligations under the Agreement. Nothing in the Agreement suggests that the Division may revoke Stolt-Nielsen's amnesty on the basis of a supposed misrepresentation after the Division had done its verification and after Stolt-Nielsen had performed by incriminating itself and others in the antitrust conspiracy. Finally, nothing in the Agreement suggests that the Division's revocation of amnesty is insulated from judicial review. *See Fuentes v. Shevin*, 407 U.S. 67, 94-96 (1972) (holding that contract's statement of the right of one party to take remedial steps against the other does not constitute a waiver of due-process right to a pre-deprivation hearing unless waiver is clear as well as voluntarily, intelligently, and knowingly made).

The Opposition even obscures the Division's own stated basis for purporting to revoke Stolt-Nielsen's amnesty. Opp. 3-4. The Division has never contended that Stolt-Nielsen, Wingfield, or any other directors, officers, or employees engaged in any collusive activity after entering into the Amnesty Agreement on January 15, 2003. Nor has the

Division ever contended that Stolt-Nielsen, Wingfield, or any other directors, officers, or employees engaged in any collusive activity after Stolt-Nielsen first contacted the Division about applying for amnesty in November 2002. Instead, the Division's stated basis for revoking Stolt-Nielsen's amnesty is that the Division believes the company should have terminated its collusive activity sometime in the first half of 2002 but did not do so until sometime in the second half of 2002. It is on this thin basis that the Division purported to revoke Stolt-Nielsen's and Wingfield's amnesty after Stolt-Nielsen's and Wingfield's dutiful performance under the Agreement.

The cumulative effect of the Opposition's selective presentation of the facts is to obscure what the district court found unequivocally: the Division received the benefit of its bargain under the Amnesty Agreement and had no basis to breach it by prosecuting Stolt-Nielsen or its executives. Pet. App. 49a.

ARGUMENT

I. The Antitrust Division Has Not Mooted The Case By Filing An Indictment During The Pendency Of This Petition.

The Opposition contends that the petition is moot because Stolt-Nielsen and Wingfield have now been indicted. Opp. 6-8. In effect, the Opposition contends that the Antitrust Division has succeeded in avoiding this Court's review by taking — during the pendency of the petition — the very action the petition seeks to avoid. Not surprisingly, this Court has consistently rejected this sort of ploy to evade judicial review. *E.g.*, *Porter v. Lee*, 328 U.S. 246, 251 (1946) (reversing finding of mootness because "[i]t has long been established that where a defendant with notice in an injunction proceeding completes the acts sought to be

enjoined the court may by mandatory injunction restore the status quo"); *Jones v. SEC*, 298 U.S. 1, 17-18 (1936) ("after a defendant has been notified of the pendency of a suit seeking an injunction against him, even though a temporary injunction be not granted, he acts at his peril and subject to the power of the court to restore the status . . . ."); *Tex. & N.O.R. Co. v. Northside Belt Ry. Co.*, 276 U.S. 475, 479 (1928) ("where a defendant, with notice of the filing of a bill for an injunction, proceeds to complete the acts sought to be enjoined, the court may, by mandatory injunction, compel a restoration of the status quo"); *Moore v. Consol. Edison Co. of N.Y.*, 409 F.3d 506, 510 & n.4 (2d Cir. 2005) (applying *Porter*); *FTC v. Weyerhaeuser Co.*, 648 F.2d 739, 741 (D.C. Cir. 1981) (same).

If this Court were to grant a writ of certiorari and reverse, the Court could restore the status quo by quashing the indictment as void *ab initio* and reviving the district court's injunction. Thus, the Antitrust Division's decision to bring an indictment against Stolt-Nielsen and Wingfield while this Court is considering the petition (and, indeed, during the period of an extension granted by the office of the clerk of this Court) does not defeat this Court's ability to review this case. *E.g.*, *City of Erie v. Pap's A.M.*, 529 U.S. 277, 288 (2000) ("Our interest in preventing litigants from attempting to manipulate the Court's jurisdiction to insulate a favorable decision from review further counsel against a finding of mootness."); *Church of Scientology of Cal. v. United States*, 506 U.S. 9, 12-13 (1992) (reversing dismissal of appeal as moot and holding that a determination of mootness is appropriate only "if an event occurs while a case is pending on appeal that makes it impossible for the court to grant 'any effectual relief whatever'") (quoting *Mills v. Green*, 159 U.S. 651, 653 (1895)).

If anything, the Division's decision to bring the pending indictment raises the stakes and makes this case an even more compelling candidate for a writ of certiorari. It is now clear that, in the absence of this Court's review, Stolt-Nielsen and Wingfield will be required to relitigate their entitlement to amnesty under the Agreement. Such relitigation will impose substantial costs upon the parties and the court system, and will introduce the possibility of inconsistent results on the same contested issues between the same parties. At a minimum, it will impose upon Stolt-Nielsen and Wingfield the burden of establishing *twice*, in two separate proceedings, their right to be free from criminal prosecution. On the other hand, if this Court were to grant certiorari and revive the district-court injunction, the relitigation would be avoided.

The Opposition also is incorrect in asserting that the issue raised by the petition is unlikely to recur as to Stolt-Nielsen. Opp. 7. The Amnesty Agreement protects Stolt-Nielsen as well as its directors, officers, and employees (*e.g.*, Pet. App. 68a-70a), and Stolt-Nielsen accordingly sought in this action to enjoin the indictment and prosecution of itself *and* its directors, officers, and employees. Stolt-Nielsen Compl. at 20. The Antitrust Division has sent "target letters" to no fewer than three additional Stolt-Nielsen directors, officers, or employees who have *not* yet been indicted. *E.g.*, Reply App. 1a (redacted). Moreover, in the press release announcing the recent indictment of Stolt-Nielsen, Wingfield, and another Stolt-Nielsen executive, the Division itself emphasized ominously that its investigation was "ongoing." Reply App. 3a, 6a. Thus, the Division's own words confirm that there is at least a "reasonable expectation" that Stolt-Nielsen's bargained-for rights under the Amnesty Agreement will be violated again by the Antitrust Division.

In short, this case continues to present this Court with the opportunity to provide effective relief to Stolt-Nielsen and

Wingfield, and to prevent further indictments in violation of the Amnesty Agreement. The Division has not insulated itself from this Court's review by bringing an indictment before the Court has had a chance to consider the petition.

II. The Seventh Circuit Holds Pre-Indictment Determinations Constitutionally Permissible, While The Third Circuit Holds Such Determinations Constitutionally Impermissible.

Conspicuously, the Opposition never quarrels with the central point in the petition that this case would have had the "opposite outcome" had it originated in the Seventh Circuit: i.e., in contrast to the Third Circuit, the Seventh Circuit would have affirmed the "authority" of the district court to hold a pre-indictment hearing and to enjoin the Antitrust Division. Pet. 19. Thus, the Opposition leaves entirely unanswered — and uncontested — the petition's asserted circuit conflict.

Instead, the Opposition argues that in *Meyer* the Seventh Circuit "made no suggestion of a *requirement* to seek a pre-indictment determination," Opp. 9, thus ignoring that *Meyer* expressly provided: "Absent exigent circumstances, an individual is *entitled* to a judicial determination of his breach *before* being deprived of his interest in the enforcement of an immunity agreement." 157 F.3d at 1076 (emphasis added). In any event, whether a pre-indictment determination is *required* is entirely irrelevant to the circuit conflict at issue.

By focusing solely on whether the Seventh Circuit *requires* pre-indictment determinations — while ignoring that the Seventh Circuit has repeatedly and emphatically endorsed pre-indictment determinations as the "preferred procedure," Pet. 13-16 — the Government misdirects the Court's attention from whether there is a genuine conflict on the "authority" issue.

There is a genuine, irreconcilable conflict because, at a minimum, the Seventh Circuit *permits* pre-indictment determinations, presupposing courts' authority to enforce such determinations, while the Third Circuit categorically *prohibits* pre-indictment determinations as violative of the Separation of Powers. This conflict warrants certiorari review for the reasons stated at Pet. 19-20.

Notably, the petition itself posited clearly and prominently throughout that the circuit conflict turns on whether courts have the "authority" to render pre-indictment determinations (*e.g.*, Pet. 10-11, 12-13, 16, 18-19, 20), not on whether pre-indictment determinations are required. The Opposition simply ignores this "authority" conflict.

Lastly, the circuit conflict is not merely some post-hoc rationale for certiorari: the district court here expressly relied on the Seventh Circuit's rule as the primary authority for the injunction. Pet. App. 45a (district court holding that its "decision is guided by the Seventh Circuit which observed that '[t]he preferred procedure, absent exigent circumstances, would be for the government to seek relief from its obligations under the immunity agreement prior to indictment'") (quoting *Meyer*, 157 F.3d at 1077). The Third Circuit based its reversal on its own contrary rule.

III. No Precedents Of This Court Or Any Other Court Support The Third Circuit's Erroneous Rule Of Law.

The Opposition mistakenly asserts that "Petitioners fail to cite any case in which a court has enjoined the federal government from obtaining an indictment against the target of an ongoing federal investigation." Opp. 8. In fact, as discussed in the petition (Pet. 23), in *Hynes* this Court affirmed an injunction against federal prosecution of salmon canners who were "threatened with criminal prosecution . . . ." 337 U.S. at 99.

The Opposition (Opp. 8) cites *Deaver v. Seymour*, 822 F.2d 66 (D.C. Cir. 1987), for the erroneous proposition that federal-court injunctions of prosecutions are authorized only for state prosecutions, not federal. But *Deaver*, which did not address *Hynes*, merely held that the plaintiff in *Deaver* was not entitled to pre-indictment relief because he had *not*, as Stolt-Nielsen and Wingfield have, "alleged the violation of a specific right guaranteed by the Constitution, the legal and practical value of which would be destroyed" unless the threatened prosecution were enjoined. *Deaver*, 822 F.2d at 70 (citation and internal quotation marks omitted).

The Opposition (Opp. 10-11) analogizes this case to *Heike*, where this Court held that a denial of criminal immunity under a now-repealed statute was not immediately appealable as an exception to the final judgment rule. As detailed in the petition (Pet. 18) but ignored by the Opposition, *Heike* (like similar courts of appeals decisions cited in the Opposition, Opp. 11) concerns the interlocutory appealability of a denial of a motion to dismiss an indictment, and has nothing to do with the authority of federal courts to determine the enforceability of a non-prosecution agreement prior to indictment.

Like the Third Circuit, the Opposition (Opp. 12) mistakenly cites *Nixon* and *Cox* for the proposition that prosecutorial discretion is insulated from judicial review. In *Nixon*, this Court held unanimously that the Watergate Special Prosecutor had the authority to subpoena audiotapes and other evidence from the president — despite the president's claim that the matter was an executive "intra-branch dispute." 418 U.S. at 693. *Cox* held that a federal judge could not order a U.S. attorney on pain of contempt to sign indictments returned by a grand jury. 342 F.2d at 169. Neither *Nixon* nor *Cox* has anything to do with non-prosecution agreements or judicial authority to enjoin illegal

prosecutions that would breach a non-prosecution agreement in violation of constitutional rights.

In sum, the Opposition fails to support the Third Circuit's unprecedented holding that federal courts lack the authority to enjoin prosecutions that would breach a non-prosecution agreement in violation of constitutional rights.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

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October 2, 2006

REPLY
APPENDIX

APPENDIX A

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Antitrust Division

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60-483111-0002

March 27, 2006

VIA TELEFAX
(202) 639-9355

George J. Terwilliger, III, Esquire
White & Case LLP
601 Thirteenth Street, N.W.
Washington, DC 20005

Re: [Name Redacted]

Dear Mr. Terwilliger:

I am writing to inform you that [Name Redacted] is regarded as a target of the grand jury investigation being conducted in the Eastern District of Pennsylvania concerning antitrust and other violations in the parcel tanker shipping industry.

Should [Name Redacted] decide to obtain personal counsel, please have counsel contact me directly. If you or

[Name Redacted]'s personal counsel wish to discuss the potential charges against [Name Redacted], please call me at (215) 597-1058 to arrange a meeting.

If he so chooses, [Name Redacted] has the opportunity to appear voluntarily before the grand jury considering this matter under the following conditions: (1) he must waive in writing his Fifth Amendment privilege against self-incrimination, (2) he must consent in writing to undergo a full examination under oath before the grand jury, and (3) he will be subject to a full and complete examination under oath concerning the matters under investigation and anything he says may be used against him.

If I do not hear from you by April 7, 2006, we will assume that you are not interested in discussing this matter further and shall proceed accordingly.

Sincerely,

/s/ Antonia R. Hill
ANTONIA R. HILL
Attorney
Antitrust Division
Philadelphia Office

APPENDIX B

Department of Justice

FOR IMMEDIATE RELEASE AT
WEDNESDAY, SEPTEMBER 6, 2006 (202) 514-2007
WWW.USDOJ.GOV TDD (202) 514-1888

STOLT-NIELSEN S.A. INDICTED ON CUSTOMER ALLOCATION, PRICE FIXING, AND BID RIGGING CHARGES FOR ITS ROLE IN AN INTERNATIONAL PARCEL TANKER SHIPPING CARTEL

Two Subsidiaries and Two Executives also Indicted

WASHINGTON — A federal grand jury in Philadelphia today returned an indictment against London-based Stolt-Nielsen S.A., two of its subsidiaries, and two executives for participating in a conspiracy to allocate customers, fix prices, and rig bids on contracts of affreightment for parcel tanker shipping of products to and from the United States and elsewhere, the Department of Justice announced. Including today's charges, five companies and five individuals have been charged and fines totaling more than $62.3 million have resulted from the Department's ongoing antitrust investigation of the parcel tanker shipping industry.

Stolt-Nielsen S.A., its subsidiaries--Stolt-Nielsen Transportation Group Ltd. of Liberia and Stolt-Nielsen Transportation Group Ltd. of Bermuda (collectively SNTG)--and U.S. citizen Samuel A. Cooperman and New Zealand citizen Richard B. Wingfield, were charged with the parcel tanker conspiracy today in U.S. District Court in Philadelphia. Cooperman is the former chairman, president and chief executive officer of SNTG. Wingfield is the former

executive vice president and managing director of tanker trading for SNTG. Both of the subsidiaries have had offices in Greenwich, Conn.

"The indictment charges Stolt-Nielsen and its executives with serious antitrust crimes--price fixing, customer allocation, and bid rigging," said Thomas O. Barnett, Assistant Attorney General in charge of the Department's Antitrust Division. "Cracking down on international cartels is the Antitrust Division's top priority and the Division will continue its efforts to aggressively pursue such illegal activity."

Parcel tanker shipping is the transportation of bulk chemicals, edible oils, acids, and other specialty liquids by compartmentalized deep sea vessels. A contract of affreightment is a contract between a customer and a parcel tanker shipping company for the transportation of bulk liquids from port to port.

The alleged conspiracy began at least as early as August 1998 and continued until as late as November 2002. The indictment charges that representatives of Stolt-Nielsen entities and two competitor companies met and agreed not to compete for one another's customers for contracts of affreightment. The defendants are charged with carrying out the secret agreement in a variety of ways, including:

- Refraining from seeking business from one another's customers, or alternatively, when asked to bid by such customers, declining to bid or submitting fraudulent bids with intentionally high prices;
- Discussing customers and prices for contracts of affreightment to avoid competition;
- Preparing, updating, and exchanging customer lists to facilitate implementation of the agreement; and

- Continuing to carry out the conspiracy through meetings and discussions and assuring competitors that the conspiracy remained in effect, even after discovery of certain evidence of the conspiracy by Stolt-Nielsen's then-general counsel.

In March 2004, the Antitrust Division revoked the conditional leniency that had previously been granted to the Stolt-Nielsen entities under the Division's Corporate Leniency Program. Stolt-Nielsen's conditional leniency was predicated on a number of representations made by the company, including a promise that the company "took prompt and effective action to terminate its part in the anticompetitive activity being reported upon discovery of the activity." The Division revoked the conditional leniency after it learned from other sources that top Stolt-Nielsen executives, including its managing director Wingfield, had continued to meet with competitors and participate in the conspiracy for months after the scheme's discovery by Stolt-Nielsen's then-general counsel, and that Stolt had both withheld and provided false and misleading information about the true extent of the conspiracy.

In February 2004, Stolt-Nielsen S.A., Stolt-Nielsen Transportation Group Ltd. of Bermuda, and Wingfield filed lawsuits seeking an injunction to prevent the Antitrust Division from indicting them. The U.S. District Court for the Eastern District of Pennsylvania granted the injunction in January 2005. In March 2006, the Court of Appeals for the Third Circuit reversed the District Court decision and, in June 2006, denied petitions for rehearing. Attempts by SNTG and Wingfield to recall and stay the mandate of the Third Circuit failed, and on Aug. 24, 2006, the District Court dissolved the injunction against the Antitrust Division.

"Stolt-Nielsen is the first company to have its conditional leniency revoked since the current program was announced in

1993," said Barnett. "Removing a company from the Corporate Leniency Program is not something the Division takes lightly but regrettably was necessary in this case to maintain the integrity of the program, which requires that those in the program provide full and truthful cooperation."

Each of the defendants is charged with participating in the conspiracy to suppress competition in violation of the Sherman Act. The maximum penalty for the conviction of a Sherman Act violation occurring before June 22, 2004, is three years imprisonment and a fine of $350,000 for individuals and a fine of $10 million for companies. The maximum fines may be increased, however, to twice the gain derived from the crime or twice the loss suffered by the victims if either of those amounts is greater than the Sherman Act maximum fines.

Today's charges result from the Division's ongoing investigation of the parcel tanker shipping industry being conducted by the Philadelphia Field Office, in conjunction with the Philadelphia Office of the Federal Bureau of Investigation.

In the fall of 2003, shipping company Odfjell Seachem AS pleaded guilty to participating in a conspiracy to allocate customers, rig bids, and fix prices in the parcel tanker shipping industry and was sentenced to pay a $42.5 million fine. Two Odfjell executives, Bjorn Sjaastad and Erik Nilsen, also pleaded guilty for their roles in the same conspiracy. Sjaastad was sentenced to four months in prison and a $250,000 fine, and Nilsen was sentenced to three months in prison and a $25,000 fine.

In early 2004, a second company, Jo Tankers B.V., also pleaded guilty to conspiring to eliminate competition on contracts of affreightment in the parcel tanker shipping industry. Jo Tankers was sentenced to pay a fine of $19.5 million, and its former co-managing director, Hendrikus van

Westenbrugge, pleaded guilty and was sentenced to pay a fine of $75,000 and to serve three months in prison.

Anyone with information concerning price fixing or other anticompetitive conduct in the parcel tanker shipping industry should contact the Philadelphia Field Office of the Antitrust Division at 215-597-7405.

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06-596

No. 06-97

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IN THE

Supreme Court of the United States

STOLT-NIELSEN, S.A.,
STOLT-NIELSEN TRANSPORTATION GROUP LTD.,
and RICHARD B. WINGFIELD,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF FOR THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AND THE ASSOCIATION OF CORPORATE COUNSEL AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Whether a corporation, which has self-reported its own misconduct to the government pursuant to an immunity agreement which promises that the corporation and its employees will not be prosecuted, may thereafter be indicted without opportunity to seek judicial review and enforcement of the government's promise, on the ground that post-indictment review is an adequate remedy at law.

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INTERESTS OF THE *AMICI*

The Chamber of Commerce of the United States of America ("Chamber"), and the Association of Corporate Counsel ("ACC"), have a substantial interest in expressing the views of the American business community and the lawyers who advise it regarding federal programs which promise significant benefits to corporations that cooperate with law enforcement officials, the foremost benefit being an immunity from the threat of a criminal indictment.[1] Their views are particularly important in a case such as this where the stigma resulting from the government's accusations against the petitioners may obscure the importance and impact of the issue to the business community at large. Criminal indictments cause dislocation and damage that reach far beyond the particular company involved and inflict injury on innocent corporate constituents such as employees, retirees, shareholders, suppliers and customers. These groups have an interest in whether the government should be permitted to inflict irreparable damage on a company. Furthermore, when such indictments issue after the government has made an express promise not to prosecute, it erodes respect for federal law enforcement. It is appropriate, therefore, that the organized business community be heard on government conduct that can have such a severe impact on American businesses.

The Chamber is the nation's largest federation of business companies and associations, representing an underlying membership of more than 3,000,000 businesses and professional organizations of every size and in every sector and geographic region of the country. An important function of the

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[1] Pursuant to Rule 37.6, no counsel for a party to this case authored any part of this brief, and no person or entity, other than the *amici*, made a monetary contribution to the preparation or submission of this brief. All parties have consented to the filing of this *amicus curiae* brief, and their consent letters are on file with the Clerk of the Court.

Chamber is to represent the interests of its members by filing *amicus curiae* briefs involving cases of national concern to the American business community.

The ACC, formerly known as the American Corporate Counsel Association, or ACCA, was formed in 1982 as the bar association for in-house counsel. With over 20,000 members from over 8,400 private sector organizations in 57 countries, ACC members represent a broad range of domestic and international public, private, and not-for-profit companies. Its members represent 98 of the Fortune 100 companies; internationally, its members represent 74 of the Global 100 companies. One of the primary missions of the ACC is to act as the voice of the in-house bar on matters of concern to corporate legal practice and, specifically, the ability of its members to fulfill their functions as leading legal and compliance counselors to their corporate clients.

Federal law enforcement policy over the past generation has encouraged corporations to report their misconduct in exchange for a promise that the corporations will avoid the irreparable damage that results from a criminal indictment, including potential disqualification from federal and state procurement, loss of customers, decreased access to capital markets and possible collapse. The Department of Justice has capitalized upon the concerns of corporate America through its Antitrust Division's Leniency Program. Under that program, the first corporation to report wrongdoing receives complete amnesty, while corporations that are not the first to report do not receive the same degree of leniency. The purpose of this program is to create a strong incentive for corporations to self-report antitrust violations. Yet the decision to self-report is a very difficult one, and whether a corporation decides to do so rests in large part on whether it has confidence that the government will honor its promises or, if the government fails to do so, that the federal courts will

be open to hear the corporation's grievances *before* damage is done.

The court of appeals decision shatters that confidence by closing the courthouse doors. It bars any pre-indictment review of the government's finding of breach of a leniency agreement and gives the government *carte blanche* to indict a corporation, even after that corporation has provided damning evidence about itself—which makes a successful defense hopeless—as well as information leading to the criminal convictions of others. If history is any guide, the immense and rising pressure from a criminal indictment then brings the company to its knees and forces a plea to a lesser offense, with the result that the aggrieved corporation never has its day in court. *Put another way, post-indictment review for the modern corporation is often no review at all.*

If the government can arbitrarily breach its agreement not to indict in this case, after it received the full benefit of its bargain (and received the very evidence that it will now use against the corporation), it can *a fortiori* breach its agreement in any case, under any pretext, knowing that no pre-indictment remedy is available in the courts. The court of appeals ruling has thus put corporate management and corporate lawyers in the untenable position of deciding whether to be good corporate citizens, abandon available defenses and cooperate with law enforcement, while being aware that there is no effective manner of enforcing the government's corresponding promise not to indict.

This case, accordingly, presents the Court with the opportunity to assure the business community that it has some opportunity, however limited, to be heard before the government acts unfairly. Contrary to the court of appeals ruling, no separation of powers concerns bar a district court from enforcing the government's leniency agreement, and ordering the remedy of specific performance, when the court de-

termines (as the district court did here) that no breach of contract has occurred.

STATEMENT

1. Petitioner Stolt-Nielsen Transportation Group is a world-wide supplier of parcel tanker shipping services. In early 2002, its general counsel resigned after advising his superiors of collusive trading practices between petitioner and its two competitors. Petitioner thereafter approached the Antitrust Division of the United States Department of Justice about obtaining leniency through the Division's Corporate Leniency Policy. Under this program, the government covenants not to charge a firm for the activity being reported, so long as several qualifying conditions are met—including the applicant's representation that upon discovery of the wrongdoing, the corporation took prompt and effective action to terminate the illegal activity. (Pet. App. 41a.)

The Department accepted petitioner into the leniency program and, by letter of January 15, 2003, entered into a binding contractual agreement with petitioner, agreeing not to prosecute the corporation or its employees, officers or directors "for any act or offense it may have committed prior to the date of this letter in connection with the anticompetitive activity being reported." (Pet. App. 41a.) The Department, however, maintained the right to declare the agreement void, should petitioner violate its obligations and, in such circumstances, to prosecute petitioner.[2]

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[2] The Corporate Conditional Leniency Letter provided that in the event of a failure to fully comply with the terms of the Agreement, the Agreement would be void and could be revoked by the Antitrust Division. "Should the Antitrust Division revoke the conditional acceptance of SNTG into the Corporate Leniency Program, the Antitrust Division may thereafter initiate a criminal prosecution against SNTG, without limitation. Should such a prosecution be initiated, any documents or other information provided by any current or former director, officer or

Despite fully cooperating with the government, and aiding in the government's conviction of two other corporations, the Department notified Stolt-Nielsen on April 8, 2003, that it was suspending its own obligations under the agreement. On March 2, 2004, the government officially withdrew its grant of leniency. The Department did not assert that petitioner failed to honor its commitment to deliver information and assistance to the government. Rather, the government claimed that petitioner, and in particular Richard B. Wingfield, the company's former Managing Director for Tanker Trading, represented that the corporation's anticompetitive activity ceased in March 2002, when it actually continued until October 2002. This was viewed as a breach of petitioners' representation that, upon discovery of the wrongdoing, prompt and effective action was taken to terminate the illegal activity. The same day that leniency was formally revoked, the government announced its intention to indict both Stolt-Nielsen and Wingfield for violations of the Sherman Act. (Pet. App. 8a.)

2. On February 6, 2004, petitioners Stolt-Nielsen and Wingfield filed a complaint in the United States District Court for the Eastern District of Pennsylvania seeking enforcement of their rights under the agreement, and requesting declaratory and injunctive relief. After an evidentiary hearing, in which the government participated, the court determined that the agreement had not been breached. Accordingly, the court enjoined the government from prosecuting petitioners "for the anticompetitive activity through January 15, 2003." (*Id.*)

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employee of SNTG to the Antitrust Division pursuant to this Agreement, may be used against SNTG in any such prosecution." (Pet. App. 68a.)

3. A two judge panel[3] of the Third Circuit reversed. The court concluded that the separation of powers between the Executive and Judicial branches barred the use of an injunction to prevent the government from seeking an indictment; that immunity agreements protect only against conviction, not indictment; and that petitioners were confined to their post-indictment remedies at law. (Pet. App. 15a, 20a.) The court did not consider whether the district court erred in its finding that petitioner had not breached the leniency agreement. (*Id.* at 21a.) An order amending the court's opinion issued on May 16, 2006. (Pet. App. 23a-25a.) A timely petition for rehearing and rehearing *en banc* was denied on June 20, 2006. (Pet. App. 30a-31a.)

On June 23, 2006, the court of appeals denied petitioners' motion to stay the mandate pending certiorari. (Pet. App. 32a-33a.) On July 20, 2006, petitioners filed a timely petition for a writ of certiorari with this Court and applied to Justice Souter to recall and stay the court of appeals mandate. The motion was denied by Justice Souter on July 26, 2006. A renewed motion was then made to Justice Stevens who referred the motion to the full Court. On August 21, 2006, the Court issued an order denying petitioners' motion.

On September 6, 2006, a grand jury returned an indictment against the petitioners.[4]

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[3] Justice Samuel A. Alito, Jr. was a member of the panel that heard the case, but was thereafter appointed to this Court.

[4] A discussion as to why this case is *not* moot appears *infra* at p.14.

REASONS FOR GRANTING THE PETITION

THE COURT OF APPEALS DECISION IS WRONG BOTH AS A MATTER OF LAW AND POLICY

A. An Indictment Can Have Devastating Consequences for a Corporation, and Thus a Post-Indictment Motion To Dismiss Is Not an Adequate Remedy.

It is hardly news that the indictment of a corporation, coupled with adverse publicity, potential loss of various licenses and rights, disaffection of suppliers, customers, and financing institutions that might otherwise arrange loans, and possible suspension from government contracts, can be catastrophic, no matter how the criminal process ultimately concludes. The case of the former accounting giant Arthur Andersen is illustrative. As Kurt Eichenwald observed in *Conspiracy of Fools: A True Story*, his account of the fall of Enron and its associates, "[t]he Andersen indictment for obstruction of justice ended the company's last hope for survival. Clients fled in droves, unwilling to allow a firm charged with a crime to serve as their financial watchdog. Around the globe, Andersen partners jumped to competing firms. By the time of Andersen's conviction in June only a small shell of the once-great firm remained, and it announced that it would cease auditing public companies. . . . The death of Andersen triggered public criticism that the prosecutors had gone too far in charging the firm." Kurt Eichenwald, *Conspiracy of Fools: A True Story* (2005) 667.[5]

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[5] *See* Kurt Eichenwald, *Enron's Many Strands: The Accountants, Miscues, Missteps and the Fall of Andersen*, N.Y. Times, May 8, 2002, at C1 (observing that Arthur Andersen began to unravel after the indictment); Benjamin M. Greenblum, Note, "*What Happens to a Prosecution Deferred? Judicial Oversight of Corporate Deferred Prosecution Agreements*," 105 Colum. L. Rev. 1863, 1888 (2005) (reporting that Andersen

Andersen is not the only entity that has been adversely affected by an indictment. In May 2006, federal prosecutors indicted the law firm of Milberg Weiss. As a result of the indictment, some of the firm's most significant clients withdrew their business. For example, the Attorney General of Ohio required that Milberg Weiss withdraw as counsel for the Ohio Tuition Trust Authority. New York State Comptroller Alan G. Hevesi, the trustee of the $140 billion New York State Common Retirement Fund, forced Milberg Weiss to step down as lead counsel in a shareholder suit against German pharmaceutical giant Bayer, and removed Milberg Weiss from the pool of firms eligible to be retained by the Fund. *See* Anthony Lin, *Comptroller Seeks To Jettison Milberg as Pension Fund Counsel*, N.Y.L.J., June 2, 2006. As Columbia University law professor John C. Coffee Jr. observed, "[a] number of public pension funds, which are always publicity sensitive, will find it difficult to use a law firm that's been indicted." *See* Joel Rosenblatt, *Indicted Firm May Go Way of Andersen: Kickback Allegation Could Create Exodus of Clients*, San Diego Union Trib., May 20, 2006. In addition, a number of partners left the firm following the indictment. *See, e.g.*, Posting of Peter Lattman to Wall Street Journal on Line Law Blog, http://blogs.wsj.com/law/category/milberg-weiss (Sept. 11, 2006, 8:55 EST) ("Milberg Weiss continues to fight a battle to keep its talent from walking out the door. Since May, when the once-dominant class-action firm was indicted on fraud charges by a federal grand jury in Los Angeles, 20 of Milberg Weiss's partners have left or are leaving the firm—close to half the

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CEO Joseph Berardino told Justice Department officials "If you want to kill us, go kill us. If you want to keep us alive, we can get through this, but we can't take an indictment."). *See also* Lynnley Porowning, *U.S. Tactic On KPMG Questioned, Judge Criticizes Legal-Fee Cutoff*, N.Y. Times, June 28, 2006, at C1-C2 (observing that in the modern era, "an indictment is often a death knell for a company, as it was for KPMG's rival, Arthur Andersen.").

total."); *see also* Joel Rosenblatt, *Indictment May Doom Milberg Weiss Law Firm*, Seattle Times, May 20, 2006, *available at* http://seattletimes.nwsource.com/html/businesstechnology/2003007065_milbergweiss20.html ("The Milberg Weiss indictment is comparable to the charges made in 2002 against Arthur Andersen, which all but drove the fifth-largest accounting firm out of business, New York University law professor Stephen Gillers said.").

The American business community, therefore, must contend with the fact that an indictment can by itself have disastrous consequences, wholly apart from whether the corporation is ultimately found innocent of the charges. Andersen, after all, is today defunct, although this Court ultimately overturned its conviction. *See Arthur Andersen LLP v. United States*, 544 U.S. 696 (2005). Eighty thousand innocent Andersen employees nonetheless lost their jobs.

The practical business consequences that can befall a corporation as a result of an indictment are numerous, and include the following categories of harm:

1. *Customer Relationships*.

Adverse publicity from an indictment can by itself affect relationships with other companies, with customers, with creditors, and with the general public. The effects can be particularly harsh for a company that trades on its reputation. *See* Eric Holder, *Don't Indict WorldCom*, Wall St. J., July 30, 2004, at A14; ("[F]or a firm that trades on its reputation . . . . the effect of the indictment and conviction was close to a death sentence."); *Andersen Pleads Not Guilty, As Workers Protest at Courthouse*, Wall St. J., Mar. 20, 2002, at C13 (quoting Andersen's lead trial attorney as saying that an indictment would be "just as bad as a conviction" in terms of reputational harm to the company); John C. Coffee, Jr. *Decoding the Andersen Incident: Myth and Reality*, N.Y.L.J.,

Apr. 5, 2002, at 1 ("[i]n comparison to an indictment, a deferred prosecution is far less stigmatizing"). Even beyond this, there is the possible loss of customers attributable to adverse publicity from an indictment. In Andersen, major clients left the company, and overseas offices began severing ties with the firm, after the indictment. Barbara Ley Toffler & Jennifer Reingold, *Final Accounting: Ambition, Greed and the Fall of Arthur Andersen* 219 (2003).

2. *Suspension from Government Programs.*

An indicted company may be suspended from doing business with the government, and may lose valuable government licenses. In Andersen's case, the corporation was aware that an indictment would threaten its viability since absent a waiver the SEC could ultimately bar Andersen from auditing public companies, and state regulators could revoke state licenses and impose other sanctions on the firm. *See* Jonathan Weil, Richard B. Schmitt & Devon Spurgeon, *Arthur Andersen Met With U.S., Hoping To Strike Agreement*, Wall St. J., Apr. 8, 2002, at C15.

Suspension from participating in federal programs can be devastating to a company. Under the Federal Acquisition Regulations ("F.A.R.") and the Nonprocurement Common Rule, an agency of the federal government may suspend a company from doing business with the federal government if (a) there is adequate cause and (b) immediate action is necessary to protect the Government's interest. F.A.R. 9.407-1(a), (b); Executive Order 12,549, 51 Fed. Reg. 6370 (Feb. 21, 1986) (setting forth Nonprocurement Common Rule). An indictment automatically constitutes "adequate evidence" for suspension. *See* F.A.R. 9.407-2(a)(7), (b) (providing that an indictment for any "offense indicating a lack of business integrity or business honesty" constitutes adequate cause for suspension). A suspension is generally government-wide. F.A.R. 9.407-1(d). A suspension based

upon an indictment is effective until the legal proceedings arising from that indictment are completed. F.A.R. 9.407-4.[6] Suspension from doing business with the government would be a matter of great consequence for a company like Stolt-Nielsen, one of the world's largest parcel tanker operators.

3. *Access to Capital Markets.*

Many companies depend at least in part on debt financing to provide the capital necessary to sustain their operations. An indictment often prevents a company from being able to obtain favorable, or indeed any, financing. An indictment may also cause currently outstanding loans to go into default. Without access to debt financing, a company may become insolvent. The presence of an indictment also affects the underwriting of any new loan that a company obtains. Lenders perform a credit assessment of prospective borrowers before financing is approved. If a company is under indictment, the credit assessment will require an analysis of the

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[6] In addition, a suspended company is restricted in conducting business with entities that receive federal funds. It may not act as a surety on federal programs. F.A.R. 28.203-7. An indicted company may be suspended from offering mortgages that are backed by the Department of Housing and Urban Development or by the Department of Veterans Affairs. 24 C.F.R. 25.5, 25.9(m), 200.229, 202.5(j); 38 C.F.R. 44.1105(b). The government may revoke or deny renewal of a company's facilities security clearance if it is suspended from participating in government contracts. Dep't of Defense Indus. Sec. Reg. DOD 5220.22-R §§ C2.1.12.7 and C2.1.19.10, *et seq.* (Dec. 4, 1985). Companies indicted for certain violations may also be denied licenses for the export or reexport of defense articles and defense services controlled under the Arms Export Control Act. 15 C.F.R. 764.3(c)(2)(ii)(A). Indicted companies may also be suspended from purchasing timber from the government. 36 C.F.R. 223.142(a)(2). Finally, state and local governments may also suspend contracting with an indicted company. *See, e.g.*, N.Y. Comp. Codes R. & Regs., Tit. 9, § 4-10(a)(1)(i) (2005) (indicted entities may be suspended from contracting with the City of New York while the indictment is pending).

likelihood of criminal liability, the potential cost of defending the suit, the potential extent of criminal liability, the impact of the indictment and potential conviction on the company's reputation, and the extent to which management resources will be diverted toward defending the company. A lender may decide not to issue financing at all, or may offer financing with terms less favorable than it would if the company were not under indictment. Indeed, many financing agreements require the borrower to represent that it is not under indictment, before obtaining the loan.[7]

Even if only one of a company's loans goes into default as a result of an indictment, it can trigger a domino effect that may endanger the company's entire financing structure. Many loans contain "cross-default" provisions that cause the loan to go into default if the borrower defaults on other loans or obligations. *See, e.g.*, Loan Agreement (Line of Credit) Between Wells Fargo Bank, N.A. and Advanced Materials, Inc., §10.1(d), *available at* http://contracts.onecle.com/admat/wells.credit.1996.11.26.shtml (triggering default if the borrower defaulted on any other debt or obligation in excess of $200,000). And even if a loan does not expressly contain such a provision, default may nonetheless result from the fact that as a practical matter, a default on one loan may constitute a "material adverse change" that triggers default on another loan. *See, e.g.*, Quickstart Loan and Security Agreement Between Silicon Valley Bank and Bombadier Software Inc., §5(f), *available at* http://contracts.onecle.com/avantgo/svbank.loan.1998.01.28.shtml.

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[7] *See, e.g.*, Revolving Line of Credit Loan Agreement (Accounts Receivable and Inventory) Between Schuff Steel Co. and Bank One, Az., § 5.1(f), *available at* http://contracts.corporate.findlaw.com/agreements/schuff/bankone.credit.1995.06.30.html.

4. *Damage to Shareholders and Employees.*

When a company suffers as a result of an indictment, its shareholders suffer as well, for the company's shares lose value. If the company becomes bankrupt, shares become worthless. Shareholders, moreover, generally do not share in the company's remaining assets as distributed by a bankruptcy court.

Employees also suffer when a company is indicted. An indictment is "a matter of life and death to many companies and therefore a matter that threatens the jobs and security of blameless employees." *United States v. Stein*, 435 F. Supp. 2d 330, 381-382 (S.D.N.Y. 2006); *see also* James Comey, Deputy Att'y Gen., U.S. Dep't of Justice, Statement at Press Conference on Charges and Settlement Against America Online for Aiding and Abetting Securities Fraud (Dec. 15, 2004), *available at* http://transcripts.cnn.com/TRANSCRIPTS/0412/15/lol.05.html) (touting deferred prosecutions as "minimiz[ing] the collateral consequences of an indictment, which would have been borne by innocent employees and investors."). Employee pension plans also may be put in jeopardy by an indictment.

In sum, the effects of an indictment can be devastating to a corporation, its employees, shareholders and customers. Accordingly, a post-indictment motion to dismiss is simply not an adequate remedy at law. The court of appeals conclusion that "the availability of dismissal after final judgment will adequately protect and secure for the defendant the benefit of his bargain under the non-prosecution agreement if he is entitled to it," (Pet. App. 20a) cannot be squared with the practical reality of how indictments adversely affect companies doing business in today's world.[8] A pre-indictment

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[8] Moreover, petitioners sought both injunctive and declaratory relief. An adequate remedy at law does not preclude declaratory relief, if that

remedy should be available, to guard against government arbitrariness, and to ensure the kind of predictability that corporations rely upon in their dealings with the United States.[9] The stakes are too high for corporations not to have access to the courts to construe and enforce leniency agreements prior to indictment.

The fact that an indictment has now occurred does not make the issues presented any less important; nor does the indictment render the case moot. There is a strong public interest in the Court's resolution of important precedential issues such as those presented by petitioners, an interest that clearly militates against a finding of mootness. *See United States v. W.T. Grant Co.*, 345 U.S. 629, 632 (1953); *United States Parole Comm'n v. Geraghty*, 445 U.S. 388, 400 (1980). Moreover, although the petitioners have been indicted, the question is not whether the precise relief sought at the time the complaint was filed is still available, but whether the Court can grant effective relief. In this case, the district court may still grant effective relief by issuing a declaratory judgment that, based on its already-established findings of fact, petitioner was not in breach of its agreement with the government.

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relief is otherwise appropriate. *See* Fed. R. Civ. P. 57. *See also* 28 U.S.C. 2201(a); *Wilton v. Seven Falls Co.*, 515 U.S. 277, 287-89 (1995).

[9] As many courts have recognized, the government's failure to honor its commitments does more than discourage others from seeking a plea bargain or immunity agreement. Violations of such agreements "directly involve the honor of the government, public confidence in the fair administration of justice, and the effective administration of justice in a federal scheme of government. . . ." *United States v. Riggs*, 287 F.3d 221, 226 (1st Cir. 2002) (*quoting United States v. McQueen*, 108 F.3d 64, 66 (4th Cir. 1997)).

B. The Court of Appeals Failed To Acknowledge that the Basis of the Bargain Was the Government's Commitment Not To Indict Petitioners.

Corporations that enter the leniency program must incriminate themselves, waive attorney-client privilege, turn over key documents, and fully cooperate with the Department of Justice in securing criminal convictions of competitors. What the corporation receives in return is immunity from indictment and prosecution, for as we have demonstrated the effects of an indictment can be devastating to a corporation.

The court of appeals erroneously ruled, however, that immunity and non-prosecution agreements "that have promised not to charge or otherwise criminally prosecute a defendant . . . protect the defendant against conviction rather than indictment and trial." (Pet. App. 14a.) This conclusion ignores the express terms of the leniency program, which grants a corporation protection from all criminal procedures including indictment so long as certain conditions are met. The Division defines "leniency" as "not *charging* such a firm criminally for the activity being reported" and notes that the policy is properly characterized as a grant of immunity. (Pet. App. 72a.) The Antitrust Division's Grand Jury Practice Manual expressly states that the term of art "lenient treatment" "*means not indicting such a firm.*" (Pet. App. 85a.) (emphasis added) Representatives of the Antitrust Division have described the Leniency Policy as "a complete pass from criminal prosecution or total immunity for a company and its cooperating employees," and have observed that "if a corporation comes forward prior to an investigation and meets the program's requirements, the grant of amnesty is certain *and is not subject to the exercise of prosecutorial discretion.*" Scott D. Hammond, Dir. of Crim. Enforcement, Antitrust Div., U.S. Dep't of Justice, Cornerstone of an Effective Leniency Program' "November 22, 2004", *available at* www.usdoj.gov/atr/public/speeches/206611.htm

(emphasis added). Accordingly, if the government's representations are to be credited, and the agreement worth the paper it is written upon, the leniency agreement must be construed as having protected petitioners from indictment. Permitting the government to indict petitioners, in the face of the express terms of the agreement, and notwithstanding petitioners' cooperation and compliance, undermines the confidence of corporations in the fairness of the process given by the government and ignores the practical reasons why the government's promise not to indict was so crucial to petitioners—and to all corporations who seek protection under the government's Leniency Program.

C. The Court of Appeals Decision Is Wrong as a Matter of Law and Eliminates any Mechanism for Enforcing Leniency Agreements Prior to Indictment.

The court of appeals erroneously determined that even though the district court, after a hearing, found that petitioners had not breached their agreement, separation of powers concerns barred the entry of equitable relief in favor of petitioners. While it is true that as a general principle the Executive Branch has absolute discretion whether to prosecute a case, it is equally true that once the Executive Branch knowingly exercises that discretion by entering into an immunity agreement it is bound to honor the agreement's terms, and separation of powers questions do not come into play. The government's prosecutorial discretion in this case was exercised when it accepted petitioner into the Leniency Program and executed the January 15, 2003 letter, which constituted a binding and enforceable agreement.[10] Ordering

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[10] *See United States v. Alegria*, 192 F.3d 179, 182 (1st Cir. 1999) ("As a general rule, nothing precludes a prosecutor from bargaining away something over which he has discretion in return for promises extracted

specific performance of that agreement, in conformance with well-established principles of contract law, does not offend the separation of powers doctrine. This Court has ruled, in the context of plea agreements, that the government must honor its promises insofar as the plea agreement rests "in any significant degree" on those promises. *Santobello v. New York*, 404 U.S. 257, 262 (1971). The Court has advised that specific performance of such agreements is among the arsenal of remedies available in district court. *Id.* at 263. Thus federal courts regularly order specific performance of plea agreements, looking to general principles of contract law. *See, e.g., United States v. Cimino*, 381 F.3d 124, 127 (2d Cir. 2004). The courts have, in such contexts, rejected separation of powers arguments, concluding, for example, that "the power of trial courts to order specific performance of plea agreements. . . . does not violate the doctrine of separation of powers, because it derives from the court's exercise of its supervisory powers." *United States v. Serubo*, 502 F. Supp. 290, 293 (E.D. Penn. 1980). *See also United States v. Lieber*, 473 F. Supp. 884, 895-96 (E.D.N.Y. 1979) (ordering specific performance of a plea agreement and rejecting the argument that the court's order interfered with the prosecutorial powers of the Executive Branch).[11]

Accordingly, this is a straight-forward case calling for the construction of an agreement between a corporation and the government, where the government clearly breached its promise not to indict, and petitioners relied to their detriment

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from a criminal defendant."); *United States v. Watson*, 988 F.2d 544, 552 (5th Cir. 1993) ("[T]he government may bargain away its discretion.").

[11] That these cases involved plea agreements rather than immunity agreements, is of no consequence. As the court of appeals acknowledged, citing this Court's *Santobello* decision, "the Government must adhere strictly to the terms of agreements made with defendants—including plea, cooperation and immunity agreements—to the extent the agreements require defendants to sacrifice constitutional rights." (Pet. App. 13a.)

on that promise, after performing their end of the bargain.[12] Authorizing federal courts to review such agreements, and to order specific performance if no breach occurred, does not transgress the Constitution's delegation of authority to the Executive Branch to conduct investigations and present criminal charges.[13] It does, however, ensure that before an

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[12] It is undisputed that petitioners fully cooperated with the government and that the information they supplied helped convict two major corporations of wrongdoing. In such circumstances, it is difficult to understand how the government could find any breach of the agreement material, for "the less the non-breaching party is deprived of the expected benefits, the less material the breach." *United States v. Casteneda*, 162 F.3d 832, 837 (5th Cir. 1998).

[13] While the court of appeals found this Court's rulings in *United States v. Hollywood Motor Car Co.*, 458 U.S. 263 (1982) (*per curiam*), and *Parr v. United States*, 351 U.S. 513 (1956), "instructive" because they "reinforce the narrowness of a defendant's ability to challenge the Government's decision to pursue a prosecution," those cases are not apposite. *Hollywood Motor Car* barred raising a vindictive prosecution claim in an interlocutory appeal to halt an ongoing prosecution. *Parr* barred an interlocutory appeal of an order dismissing an indictment. These cases did not involve the construction of an immunity agreement in which a corporation was assured it would not be indicted, but only whether certain orders were final judgments within the meaning of 28 U.S.C. 1291. The government's citation of the 1910 case *Heike v. United States*, 217 U.S. 423 (1910), is also flawed. *Heike* involved a statutory grant of immunity to persons who fell into a particular defined class. This Court simply held that an interlocutory appeal, prior to trial, was not available to individuals in that class.

Nonetheless, if any collateral order decisions are relevant, they are surely the rulings of this Court in *Mitchell v. Forsyth*, 472 U.S. 511 (1985), and *Behrens v. Pelletier*, 516 U.S. 299 (1996), permitting interlocutory appeals of orders denying official immunity. Those decisions are founded on the Court's recognition that the immunity doctrine protects an official from the burdens of both discovery and trial, rights that would be effectively lost if an interlocutory appeal of a denial of immunity was not available. The Antitrust Division's Leniency Policy is by its own terms an immunity from all criminal prosecution, including indictment. This immunity would also be irrevocably lost if the government could, without

indictment triggers what is often devastating harm, a corporation may have a court review whether a breach of the agreement occurred.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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regard to the terms of its bargain, seek an indictment after it had covenanted not to do so.

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No. 06-97

In The Supreme Court of the United States

STOLT-NIELSEN S.A.,
STOLT-NIELSEN TRANSPORTATION GROUP LTD.,
AND RICHARD B. WINGFIELD,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

MOTION FOR LEAVE TO FILE AND BRIEF OF THE GRAND DUCHY OF LUXEMBOURG AS AMICUS CURIAE IN SUPPORT OF PETITIONERS

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PURPOSE

Pursuant to Supreme Court Rule 37.2(b), the Grand Duchy of Luxembourg respectfully moves the Court for leave to file an amicus brief in support of the petition for writ of certiorari to review the decision of the United States Court of Appeals for the Third Circuit in *Stolt-Nielsen, S.A. v. United States*, 442 F.3d 177 (3d Cir. 2006).

FACTS

On August 17, 2006, the Grand Duchy of Luxembourg, through its counsel Orrick, Herrington & Sutcliffe LLP, requested the written consent of the United States to the filing of its amicus brief, but has not yet received such consent. Written consent from Petitioners has been obtained and is being filed with the Clerk of the Court.

THE NATURE OF MOVANT'S INTEREST

As an original signatory to the 1957 Treaty of Rome and subsequent treaties which have collectively established the European Institutions and the structures and principles underlying the European Union, Luxembourg has a rich history of fostering international trade and cooperation between friendly democracies. The United States, the Respondent in this case, is Luxembourg's most important non-European trading partner. In 2005 alone, trade between the two countries totaled over $1,170,000,000. Petitioners in this case include Stolt-Nielsen, S.A., which is the first Luxembourg company to be listed on the NASDAQ exchange.

Luxembourg has an equally strong interest in protecting competition in the global marketplace. Competition rules were laid down in the Treaty of Rome and Luxembourg has attached high priority to vigorous,

predictable and efficient observance of applicable competition law rules. An important element of a sound competition policy is an effective leniency program for companies cooperating in cartel investigations. Such programs, if enforced in a transparent and predictable manner, result in enhanced antitrust enforcement, fewer cartels, and stronger global economies.

The Third Circuit's decision creates conflict among the Circuits and thus confusion for Luxembourg companies and other entities as to a private party's right to seek equitable enforcement of a non-prosecution agreement with the U.S. government in a U.S. court. Resolution of that Circuit conflict will provide Luxembourg companies greater certainty with respect to their U.S. trade activities and greater repose in their decisions to assist cartel enforcement endeavors through leniency programs. Such certainty will foster trade between Luxembourg and the United States.

CONCLUSION

For the reasons set forth above and pursuant to Supreme Court Rule 37.2(b), the Grand Duchy of Luxembourg respectfully moves the Court for leave to file an amicus brief in support of Petitioners.

Respectfully submitted,

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No. 06-97

In The Supreme Court of the United States

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Respondent.

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BRIEF OF THE GRAND DUCHY OF LUXEMBOURG AS AMICUS CURIAE IN SUPPORT OF PETITIONERS

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INTEREST OF THE AMICUS CURIAE

As an original signatory to the 1957 Treaty of Rome and subsequent treaties which have collectively established the European Institutions and the structures and principles underlying the European Union, Luxembourg has a rich history of fostering international trade and cooperation between friendly democracies. The United States is Luxembourg's most important non-European trading partner. In 2005 alone, trade between the two countries totaled over $1,170,000,000. The petitioners in this case include Stolt-Nielsen, S.A., which is the first Luxembourg company to be listed on the NASDAQ exchange.

Luxembourg has an equally strong interest in protecting competition in the global marketplace. Competition rules were laid down in the Treaty of Rome and Luxembourg has attached high priority to vigorous, predictable and efficient observance of applicable competition law rules. An important element of a sound competition policy is an effective leniency program. Such programs, if enforced in a transparent and predictable manner, result in enhanced antitrust enforcement, fewer cartels, and stronger global economies.

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[1] Pursuant to Supreme Court Rule 37.6, no counsel for any party authored this brief in whole or in part, and no person or entity other than amicus curiae or its counsel made any monetary contribution to its preparation or submission. Pursuant to Supreme Court Rule 37.2(a), Luxembourg is filing the written consent of the Petitioners to the filing of this brief. Luxembourg has not yet received the consent of the United States to the filing of this brief.

SUMMARY OF ARGUMENT

Free trade and international commerce are fostered by eradicating anticompetitive behavior by cartels. Corporate leniency programs play an important role in cartel enforcement, and are most effective when private parties are confident that non-prosecution agreements will be fully respected.

The Third Circuit's decision creates conflict among the Circuits and thus confusion for Luxembourg companies and other entities as to a private party's right to seek equitable enforcement of a non-prosecution agreement with the U.S. government in a U.S. court. Resolution of that Circuit conflict will provide Luxembourg companies greater certainty with respect to their U.S. trade activities and greater repose in their decisions to assist cartel enforcement endeavors through leniency programs. Such certainty will foster trade between Luxembourg and the United States.

ARGUMENT

1. International Trade Depends On Sound Antitrust Policies Being Enforced In A Predictable Manner.

Markets function best and trade flourishes when there is effective antitrust enforcement. *See* AREEDA & HOVENKAMP, ANTITRUST LAW, at ¶ 101 (2d ed. 2000). It is for that reason that Luxembourg, which depends on trade, has been a vigorous supporter of sound antitrust enforcement policies. As discussed below, effective leniency programs have been instrumental to antitrust enforcement and have served as effective deterrents to cartel behavior. When a split exists between U.S. Circuit Courts regarding the enforceability of leniency agreements, however, companies doing business in the U.S. lose the benefits of predictable

antitrust policy. The resulting confusion is a significant impediment to international trade.

2. Luxembourg Urges The Court To Resolve The Split In The Circuits Regarding Pre-Indictment Review of Non-Prosecution Agreements.

The inconsistency between the Third and Seventh Circuits regarding the propriety of pre-indictment judicial review of non-prosecution agreements threatens the consistency and predictability that are hallmarks of the U.S. leniency program.

Greater certainty and predictability regarding the availability of judicial protection for non-prosecution agreements will enhance the effectiveness of the leniency program and encourage continued participation therein. In that same vein, such certainty and predictability will permit Luxembourg companies to make fully-informed business decisions when operating under U.S. jurisdiction.

CONCLUSION

For the reasons set forth above, Luxembourg respectfully urges the Court to grant the petition for writ of certiorari and to review the Third Circuit's decision.

Respectfully submitted,

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IN THE

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~~MOTION FOR LEAVE TO FILE AND~~ BRIEF OF THE INTERNATIONAL ASSOCIATION OF INDEPENDENT TANKER OWNERS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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September 20, 2006

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IN THE

Supreme Court of the United States

No. 06-97

STOLT-NIELSEN S.A.,
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UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

MOTION FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE* [1]

For reasons stated in the accompanying Brief of *Amicus Curiae* International Association of Independent Tanker Owners in Support of Petitioners ("INTERTANKO"), INTERTANKO respectfully requests that the Court grant leave to file the attached *amicus* brief in support of petitioners' request that a writ of certiorari issue to the United States Court of Appeals for the Third Circuit.

[1] Pursuant to Sup. Ct. R. 37.6, no counsel for a party in this case authored this brief in whole or in part, and no monetary contribution to the preparation or submission of the brief was made by any person other than the *amicus curiae*.

The Third Circuit's decision for which issuance of a writ is sought reflects conflict among the Circuits and confusion as to a private party's right to seek pre-indictment enforcement of a non-prosecution agreement with the U.S. government. Resolution of this conflict will provide INTERTANKO members, as well as other private parties, clarity and repose in decisions to assist cartel enforcement endeavors through the U.S. leniency program.

Pursuant to Rule 37.2 of the Rules of this Court, INTERTANKO has sought and received written consent for the filing of the attached *Amicus Curiae* Brief from counsel for the Petitioner and Respondent. On September 14, 2006, counsel for petitioners consented in writing to the filing of this brief. On September 15, 2006, INTERTANKO requested consent from counsel for respondents. On the same day, INTERTANKO received written consent from counsel for respondents.[2] Accordingly, counsel for INTERTANKO moves for leave to file the accompanying brief as *amicus curiae* in support of the petition for a writ of certiorari.

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September 20, 2006

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[2] Letters from Petitioner and Respondent indicating consent to file are being filed with the clerk of the Court.

QUESTION PRESENTED

Whether the federal courts have authority to enjoin federal prosecutors of the executive branch of government from the filing of indictments against parties who have disclosed violations of federal law pursuant to Amnesty Agreements that commit the United States not to bring criminal prosecution against those parties.

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IN THE

Supreme Court of the United States

No. 06-97

STOLT-NIELSEN S.A.,
STOLT-NIELSEN TRANSPORTATION GROUP LTD.,
AND RICHARD B. WINGFIELD,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF OF *AMICUS CURIAE* INTERNATIONAL ASSOCIATION OF INDEPENDENT TANKER OWNERS

INTEREST OF *AMICUS CURIAE*

INTERTANKO is an unincorporated, not-for-profit association of independent tanker owners and operators of oil and chemical tankers, with registered offices in London, Oslo, Singapore and Arlington, Virginia. INTERTANKO's principal offices are in London and Oslo. Membership in INTERTANKO is open to independent tanker owners and operators of oil and chemical tankers. As of August 2006, the organization's membership represents approximately three-quarters of the world's independent tanker fleet. As a global

association, INTERTANKO is familiar with and supports the free competition goals of the many national jurisdictions in which INTERTANKO members operate. Because the shipping industry operates in multiple jurisdictions, INTERTANKO is uniquely situated to apprise this Court of the importance of issues faced by entities working to comply with a wide range of competition regimes. INTERTANKO's goals as an association include free competition among its members. Legal regimes that promote market competition in maritime trading advance the interests of INTERTANKO members. Similarly, policies and procedures that promote compliance and disclosure by parties that find themselves in violation of competition laws also benefit shipowners who operate in one of the world's most competitive industries.

The Third Circuit's decision, however, creates conflict between Circuit Courts of the United States and thus confusion for INTERTANKO members as to a private party's right to seek pre-indictment equitable enforcement of a non-prosecution agreement with the U.S. government. Resolution of this conflict will provide INTERTANKO members and other international businesses with certainty concerning U.S. prosecutorial obligations and with regard to decisions to assist cartel enforcement endeavors through the U.S. leniency program.

INTERTANKO submits that the issue of whether federal courts may review rescission of immunity agreements prior to indictment is an issue that merits review by this Court and requests that a writ issue to the Third Circuit. Because of the important domestic and international impact of this case, to allow the Third Circuit's decision to stand would disrupt judicial harmony and create a disincentive to voluntary disclosure arrangements. Because other nations and regional competition bodies have modeled their compliance programs on those of the United States, INTERTANKO is concerned with negative international implications of the Third Circuit's

position should it remain controlling law in any region of the United States.

STATEMENT OF THE CASE

INTERTANKO adopts the Statement of the Case contained in the Petition.

SUMMARY OF ARGUMENT

This case arises from a direct conflict between Circuit courts regarding the authority of federal courts to enjoin prosecutors from abrogating non-prosecution agreements. In the instant matter, the United States Court of Appeals for the Third Circuit held that a federal district court may not enjoin the U.S. government from revoking an amnesty agreement with a private party. *Stolt-Nielsen, S.A. v. United States*, 442 F.3d 177 (3d Cir. 2006). By reversing the district court's decision to enjoin the indictment of the amnesty applicant, the Third Circuit creates a direct conflict with jurisprudence from the Seventh Circuit, which holds that the government may not set aside a non-prosecution agreement without first seeking judicial determination that the defendant had breached the agreement. *United States v. Meyer*, 157 F.3d 1067 (7th Cir. 1998).

The Third Circuit's interpretation of limits on federal courts' supervisory authority threatens INTERTANKO's members with uncertainty and risk in a company's decision to enter into discussions with a competition authority, particularly in the United States. The overwhelming influence and success of the U.S. amnesty program has dominated successor programs in almost every country with an antitrust regime. Thus, while other governments have developed their own mechanisms for negotiating amnesty or leniency programs, the United States' rescission of its amnesty agreement with Stolt-Nielsen sets disturbing precedent for amnesty seekers in countries that align themselves with the U.S. model. The current climate of cooperation between the

United States and other national and regional competition regimes amplifies the issue. Even if another jurisdiction rejected the approach taken by the U.S. government in this case, potential applicants could not be assured that they could avoid subsequently defending against prosecution in the United States.

ARGUMENT

I. CONFLICT BETWEEN CIRCUITS CREATES UNCERTAINTY FOR AMNESTY APPLICANTS, JUDICIAL REVIEW WILL PROVIDE STANDARDS BY WHICH AMNESTY SEEKERS CAN GAUGE THEIR CONDUCT.

Several Circuit Courts of Appeal have decided that due process requires the government to seek a court determination of breach of a non-prosecution agreement before being released of its obligations to that defendant. The Third Circuit, on a separation of powers rationale, has held that federal courts may not enjoin U.S. Department of Justice determinations to rescind or depart from the undertakings of an amnesty agreement. The opinion below thus permits unilateral abrogation of the precise bargain sought by applicants under the DOJ's Leniency Policy—the promise to not prosecute. As such, the Third Circuit's decision has created a direct conflict with sister circuits, which is the benchmark of a genuine issue to be resolved by this Court. 28 U.S.C. § 1245.

This Court has recognized that a prosecutor must honor its agreements. In *Santobello v. New York*, this Court stated that when a defendant's agreement to implicate himself rests "to any significant degree on a promise or agreement of a prosecutor, so that it can be said to be part of the inducement or consideration, such promise must be fulfilled." *Santobello*, 404 U.S. 257, 262 (1971). The concept of prosecutorial accountability has been echoed in the Courts of Appeal. *United States v. Verrusio*, 803 F.2d 885 (7th Cir. 1986);

United States v. Meyer, 157 F.3d 1067 (7th Cir. 1998); *United States v. Calabrese*, 645 F.2d 1379 (10th Cir. 1981); *United States v. Brown*, 801 F.2d 352, 355 (8th Cir. 1986); *United States v. Minn. Mining & Mfg. Co.*, 551 F.2d 1106, 1111 (8th Cir. 1977); *United States v. Castaneda*, 162 F.3d 832 (5th Cir. 1998); *United States v. Watson*, 988 F.2d 544, 552 (5th Cir. 1993).

In particular, the opinion below conflicts with the Seventh Circuit's position that judicial determination is required *before* the government may rescind a cooperation agreement. *United States v. Verrusio*, 803 F.2d 885 (7th Cir. 1986); *United States v. Meyer*, 157 F.3d 1067 (7th Cir. 1998). In *Verrusio*, the Seventh Circuit reversed and remanded a denial of the defendant's motion to dismiss portions of an indictment. The court held that the government improperly began trial proceedings without first obtaining a judicial determination that the defendant had breached the plea agreement.

Similarly, in *United States v. Meyer*, the Seventh Circuit held that prosecutors must obtain judicial determination of a breach, before taking the very action it bargained away in the agreement. In so holding, that Court of Appeals reasoned that a "fundamental requirement of the due process clause is that an individual receive notice and the opportunity for a hearing before he is deprived of a significant property interest." 157 F.3d at 1076. With respect to immunity agreements, due process "requires prosecutors to scrupulously adhere to commitments made to suspects in which they induce the suspects to surrender their constitutional rights in exchange for the suspects giving evidence that the government needs against others which simultaneously implicates themselves." *Id.*, citing *Verrusio*, 803 F.2d 885, 888 (7th Cir. 1986). Importantly, the Seventh Circuit stated that the "preferred procedure" would be for the government to seek relief from its obligations under the immunity agreement *prior* to indictment. *Meyer*, at 1077. Thus, under the Seventh Circuit's

case law (contrary to the decision below), parties seeking to cooperate under the U.S. regime could conclude that they would have a pre-indictment opportunity to contest a government decision to indict, and to preserve the nature of the bargain with prosecutors if the government's position on compliance with the agreement was not well-grounded.

II. THE GOVERNMENT'S REPRESENTATIONS ON IMMUNITY INCREASE CONFUSION REGARDING PROTECTIONS FOR AMNESTY APPLICANTS.

Since the inception of its Leniency Policy, DOJ has continued to represent that it will forego prosecution of parties that enter into an amnesty agreement: "'Leniency' means not charging such a firm criminally for the activity being reported." DOJ Corporate Leniency Policy (Issued Aug. 10, 1993). DOJ has held out the surrender of prosecutorial discretion as its part of the bargain with potential applicants, stating: "However, in order for an Amnesty Program to work, you need to do more than just publicize your policies and educate the public. *You have to be willing to make the ultimate sacrifice for transparency—the abdication of prosecutorial discretion.*" Speech by Antitrust Division Director of Criminal Enforcement Scott D. Hammond (Sept. 12, 2000) (emphasis added) ("The Division's Amnesty Program by its very nature is transparent because we have eliminated, to a great extent, the exercise of prosecutorial discretion in its application.").[1] Although seemingly contrary to its actions in this case, DOJ maintains that transparency is a key component of any successful amnesty program. Speech

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[1] "An amnesty program must provide significant benefits as compared with the alternative strategies of staying in a cartel or withdrawing but remaining silent. . . . [I]f they take the risk of coming forward, they will get the reward." Speech by Assistant Attorney Gen. Antitrust Division Thomas O. Barnett (Sept. 14, 2006).

by Assistant Attorney Gen. Antitrust Division Thomas O. Barnett (Sept. 14, 2006) ("There must be predictability and transparency to the amnesty program.").[2] DOJ is aware of its influence upon other antitrust amnesty programs.[3]

III. THE DECISION BELOW WEAKENS THE EFFICACY OF AMNESTY PROGRAMS ABROAD AND RISKS CREATING POLITICAL CONFLICT.

The United States has recognized that a leniency program works only if there is predictability and certainty in obtaining amnesty. This sentiment has been echoed by other regimes. The Organisation for Economic Co-operation and Development ("OECD") has recognized that "firms may be more likely to come forward if the conditions and the likely benefits of doing so are clear. To maximize the incentive for defection and encourage cartels to break down more quickly, it is important not only that the first one to confess receive the 'best deal', but also that the terms of the deal be as clear as possible at the outset." OECD, Directorate for Financial Fiscal and Enterprise Affairs, Committee on Competition

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[2] "[T]he success of an amnesty program depends on potential applicants having confidence that they will obtain the benefits of amnesty if they comply with a set of clear requirements. In the United States' experience, cooperating parties come forward in direct proportion to the predictability and certainty of their treatment following cooperation." Speech by Assistant Attorney Gen. Antitrust Division Thomas O. Barnett (Sept. 14, 2006).

[3] "[T]he benefits of vigorous, principled cartel enforcement flow across borders." *Id.* (Comparing the DOJ's policies to spin-off enforcement and amnesty programs in Japan, Ireland, Israel, United Kingdom (noting "creation of a corporate leniency program modeled after the Division's Leniency Program"), Canada, and the European Commission (noting that "cartel investigators in the Division have never worked as closely and as effectively with our colleagues in the European Commission as they do today. A prime example is the convergence in our corporate leniency programs . . .")).

Law and Policy, "Report on Leniency Programmes to Fight Hard Core Cartels," DAFFE/CLP (2001) 13, at 2. The European Union likewise recognizes that amnesty applicants should be entitled to fair notice of their risks when coming forward to cooperate with the government. "[E]xperience has shown that [an amnesty program's] effectiveness would be improved by an increase in the transparency and certainty of the conditions on which any reduction of fines will be granted." Commission notice on immunity from fines and reduction of fines in cartel cases, (2002/C 45/03) (Feb. 19, 2002), at 1 ("Commission Notice"). "The Commission is aware that this notice will create legitimate expectations on which under-takings may rely when disclosing the existence of a cartel to the Commission." Commission Notice, at 2. Without transparency, potential applicants are unlikely to reveal themselves and cartels could go uncovered because, as noted by U.S. enforcers, "[u]ncertainty in the qualification process will kill an amnesty program." Speech by Antitrust Division Director of Criminal Enforcement Scott D. Hammond (Sept. 12, 2000).

The decision below raises legitimate concerns in the bar and with companies, which must now re-evaluate the appeal and utility of the U.S. amnesty program. Sue Reisinger, *Promise Breakers*, CORPORATE COUNSEL, at 21 (Sept. 2006) (positing that the government's attempt to renege on its deal with an amnesty applicant has caused companies to question whether non-prosecution agreements can still deliver their main benefit—freedom from indictment); Richard M. Cooper, *Non-prosecution Issues*, THE NATIONAL LAW JOURNAL, at 15 (Apr. 10, 2006) (noting that an indictment may be economically as harmful—or more so—as an ultimate conviction). The pressure of the amnesty process is not insignificant, and "there is no going back." ABA Section of Antitrust Law, *Spanning the Globe: What Every In-House Counsel at a Multinational Company Needs to Know*, 3 THE ANTITRUST SOURCE 4, at 7 (March 2004) ("*Spanning the Globe*") (noting that "[T]he

decision to seek amnesty is a monumental and extraordinarily difficult one. Once an amnesty request has been made, as a practical matter there is no going back."). Because of the global influence of the U.S. regime, potential amnesty seekers rightfully wonder if other jurisdictions will follow suit—as they play "follow the leader" in setting up their own amnesty regimes. *Spanning the Globe*, at 7 ("All the cartel enforcers around the world are bragging of late about how much cooperation there is, so, clearly, they are talking to one another.").

As noted, many foreign national and regional competition regimes pattern their programs after those of the United States. In particular, the governments of Canada and the United Kingdom openly rely on U.S. policy as part of their leniency programs. In analyzing particular elements of its leniency program, Canada has cited that "[t]he US DOJ's Corporate Leniency Policy is the foundation of the [Canadian] Bureau's approach." Competition Bureau Canada, "Immunity Program Review Consultation Paper—Erratum," Competition Bureau (February 2006), at 19 (examining the role of the applicant in the illegal activity) and 24 (noting that Canada's "immunity plus" program is "based on the U.S. DOJ 'amnesty plus' program . . ."). Canada has similarly stated that "[p]olicy convergence will assist applicants seeking immunity in multiple jurisdictions and facilitate cooperation and coordination among competition authorities. It is particularly relevant in respect of the United States (the 'U.S.'), given geographic proximity and market integration." Erratum, at 3. The approach of Canada is similar to that of the United Kingdom.

The U.K.'s Office of Fair Trading ("OFT") has mechanically incorporated facets of the U.S. amnesty approach into its own program on leniency. For example, on the issue of an amnesty-plus option, OFT has stated: "The UK practice is intended closely to mirror the US practice." Office of Fair

Trading, "Leniency and no-action," OFT's interim note on the handling of applications at 22, OFT803 (July 2005). In addition, OFT has held up the U.S. program as a standard in developing its own analysis of amnesty positions with regard to: coercion ("As with the Department of Justice currently, the OFT believes . . ."), at 11, 12; dishonesty ("Fundamentally, there is no difference here with the US system . . ."), at 13, 15; and amnesty for individual applicants ("As with the US system, an individual is at liberty to apply for individual immunity . . ."), at 17. Reliance on the U.S. approach will undoubtedly lead other regimes to question their own power to unilaterally revoke a non-prosecution agreement. This shift in the transparency and predictability of leniency programs would result in a diminution of incentive or clarity for multinational companies that contemplate cooperating with competition enforcers.

CONCLUSION

For the foregoing reasons, INTERTANKO respectfully requests that the Court grant the petition of Stolt-Nielsen, S.A., *et al.*, for issuance of a writ of certiorari to the United States Court of Appeals for the Third Circuit.

Respectfully submitted,

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IN THE

Supreme Court of the United States

STOLT-NIELSEN S.A.,
STOLT-NIELSEN TRANSPORTATION GROUP LTD.,
AND RICHARD B. WINGFIELD,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF OF THE INTERNATIONAL ASSOCIATION OF INDEPENDENT TANKER OWNERS AS AMICUS CURIAE IN SUPPORT OF PETITIONERS

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AUGUST 21, 2006

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D.C. 20001

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IN THE

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STOLT-NIELSEN S.A.,
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AND RICHARD B. WINGFIELD,

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v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

MOTION OF THE INTERNATIONAL ASSOCIATION OF INDEPENDENT TANKER OWNERS FOR LEAVE TO FILE AN AMICUS BRIEF IN SUPPORT OF PETITIONERS

THE NATURE OF MOVANT'S INTEREST

For the reasons stated in the accompanying brief and statement of interest of the amicus curiae, the International Association of Independent Tanker Owners (INTERTANKO) respectfully moves pursuant to Supreme Court Rule 37 to file the accompanying brief amicus curiae. INTERTANKO sought the consent of the United States on August 21, 2006 and received the consent of Petitioners on August 18, 2006.

Respectfully submitted,

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August 21, 2006

INTEREST OF AMICUS CURIAE[1]

1. This Amicus Curiae Brief is filed by the International Association of Independent Tanker Owners (INTERTANKO), two petitioners in this matter, Stolt-Nielsen, being members of INTERTANKO.

2. INTERTANKO is an unincorporated, not for profit association that has registered offices in London, Oslo, Singapore and Arlington (VA, USA). Its principal offices are in London and Oslo. Membership of INTERTANKO is open to independent tanker owners and operators of oil and chemical tankers, i.e. non-oil companies tanker owners. Independent owners operate some 80% of the world's tanker fleet and the vast majority are INTERTANKO members. As of August 2006, the organisation has 254 members, whose combined fleet comprises more than 2,500 tankers totalling 217 million tons deadweight, amounting to nearly 75% of the world's independent tanker fleet of those companies with 1m dwt or more. INTERTANKO's associate membership stands at 310 companies with an interest in shipping of oil and chemicals.

3. INTERTANKO has a vision of a professional, efficient and respected industry, that is dedicated to achieving safe transport, cleaner seas and free competition. INTERTANKO as a non-governmental organisation has observer status at the International Maritime Organisation (IMO) and is an active participant at the IMO meetings.

4. The Shipping industry by its very nature is a truly global business that operates in a myriad of jurisdictions. The industry is the workhorse of the global economy. Furthermore it is essential for ship operators that rules and regulations

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[1] Pursuant to Sup. Ct. R. 37.6, no counsel for a party in this case authored this brief in whole or in part, and no monetary contribution to the preparation or submission of the brief was made by any person other than the *amicus curiae*.

follow the due process of law in whichever jurisdiction they operate. INTERTANKO and its members seek to uphold the highest standards and to follow laws and regulations promulgated whether internationally, regionally or by individual States. INTERTANKO and its members expect that decisions of administrations follow the due process of law.

5. The petition for certiorari filed in this matter raises an important issue as to whether the due process of law has been followed by the United States Department of Justice (Antitrust Division). Equal treatment and protection under the law from arbitrary government action is a principle that all INTERTANKO members subscribe to. INTERTANKO supports the clarification sought by the petitioners and therefore files this amicus curiae brief.

Respectfully submitted,

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August 21, 2006

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No. 06 - 97

In the
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Petitioners,
v.
UNITED STATES,
Respondent.

On Petition for Writ of *Certiorari*
to the United States Court of Appeals for the Third Circuit

BRIEF OF *AMICUS CURIÆ* NEW ENGLAND LEGAL FOUNDATION IN SUPPORT OF PETITIONERS

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On Petition for Writ of *Certiorari*
to the United States Court of Appeals for the Third Circuit

MOTION OF *AMICUS CURIAE* NEW ENGLAND LEGAL FOUNDATION FOR LEAVE TO FILE BRIEF IN SUPPORT OF PETITIONER

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Pursuant to Supreme Court Rule 37.2, counsel for *Amicus Curiae* has attempted to secure written consent for the filing of the attached *Amicus Curiae* Brief from counsel for the Petitioner and Respondent. Counsel for Petitioner granted such consent and its assent accompanies this motion and brief. Although counsel for *Amicus* requested assent from counsel for Respondent on August 15, 2006, counsel for Respondent has yet to inform counsel for *Amicus* of respondent's position on the filing of the attached *Amicus Curiae* Brief. Accordingly, counsel for *Amicus Curiae* hereby moves this Court for leave to file the Brief *Amicus Curiae* which is submitted herewith. *Amicus* makes this motion on the following grounds:

NELF is a non-profit, public interest law firm, incorporated in Massachusetts in 1977. It is headquartered in Boston. Its membership consists of corporations, law firms, individuals, and others who believe in NELF's mission of promoting balanced economic growth for the United States and the New England region, protecting the free enterprise system, and defending economic rights. NELF's more than 130 members and supporters include a cross-section of large and small corporations, primarily from New England.

NELF's members are affected by the business climate in New England, which depends, in part, upon a fair balance in the regulation of the free market by the government. Heavy-handed prosecutions of corporations can unfairly harm employees uninvolved in alleged wrongdoing, innocent investors, and entire sectors of the economy. Because of the highly regulated nature of the modern economy, the business community is concerned that, unless reasonable standards are adopted concerning the conditions that must be met before an indictment can be sought based on alleged violations of a nonprosecution agreement, premature and perhaps unwarranted indictment could bring down an entire company.

The absence of such standards hurts businesses and their employees in all sectors, in part because they increase risk and deter capital investment.

NELF has regularly appeared in state and federal courts, as party or counsel, in cases raising issues of general economic significance to the New England and national business communities. *See, e.g., Rapanos v. United States*, 126 S. Ct. 2208 (2006); *S.D. Warren Co. v. Maine Bd. of Envtl. Protection*, 126 S. Ct. 1843 (2006); *Kelo v. City of New London*, 125 S. Ct. 2655 (2005); *San Remo Hotel, L.P. v. City of San Francisco*, 545 U.S. 323 (2005); *Exxon Mobil Corp. v. Saudi Basic Indus. Corp.*, 544 U.S. 280 (2005); *Commissioner v. Banks*, 125 S. Ct. 826 (2005); *Green Tree Fin. Corp. v. Bazzle*, 539 U.S. 444 (2003); *EEOC v. Waffle House, Inc.*, 534 U.S. 279 (2002); *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001); *Crosby v. National Foreign Trade Council*, 530 U.S. 363 (2000).

Of particular concern to NELF and its members in this case is that Stolt-Nielsen was first induced to disclose confidential information because of a signed nonprosecution agreement. Then, afterwards, based in part on the disclosed information, prosecutors sought to indict Stolt-Nielsen without first obtaining a determination that it had breached the agreement. Given the serious effects that the mere fact of an indictment can have on a business entity, if the decision below stands, businesses may now be less willing to cooperate with the government in regulatory investigations than before, to the detriment of both the business community and society as a whole.

Amicus Curiæ therefore believes that this brief provides an additional perspective, which may aid the Court in determining whether to grant the petition for a writ of *certiorari* of the petitioners, Stolt-Nielsen S.A. and Stolt-Nielsen

Transportation Group, Ltd. (collectively, "Stolt-Nielsen") and Richard B. Wingfield.

Wherefore, NELF respectfully requests that this Court grant *Amicus Curiae* leave to file the attached brief in support of the Petition for a Writ of *Certiorari*.

Respectfully submitted,

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Dated: August 21, 2006

QUESTION PRESENTED

Do the federal courts lack authority, under the Separation of Powers doctrine, to enjoin federal prosecutors from breaching a binding contractual obligation "not to bring any criminal prosecution" against a company and its executives?

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No. 06 - 97

In the
Supreme Court of the United States
October Term, 2006

STOLT-NIELSEN S.A. *et al.*,
Petitioners,
v.
UNITED STATES,
Respondent.

On Petition for Writ of *Certiorari*
to the United States Court of Appeals for the Third Circuit

BRIEF OF *AMICUS CURIÆ* NEW ENGLAND LEGAL FOUNDATION IN SUPPORT OF PETITIONERS

INTEREST OF *AMICUS CURIÆ*

Amicus Curiæ New England Legal Foundation ("NELF") seeks to bring to the Court's attention its views, and the views of its supporters, concerning the potentially devastating effects on a business of a premature indictment.[1]

NELF is a non-profit, public interest law firm, incorporated in Massachusetts in 1977. It is headquartered in Boston. Its membership consists of corporations, law firms, individuals, and others who believe in NELF's mission of promoting balanced economic growth for the United States and

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1 Pursuant to Supreme Court Rule 37.6, counsel for *amicus* states that neither counsel for Petitioners nor Respondent authored this Brief in whole or in part and no person or entity other than *amicus* made a monetary contribution to the preparation or submission of the brief.

the New England region, protecting the free enterprise system, and defending economic rights. NELF's more than 130 members and supporters include a cross-section of large and small corporations, primarily from New England.

NELF's members are affected by the business climate in New England, which depends, in part, upon a fair balance in the regulation of the free market by the government. Heavy-handed prosecutions of corporations can unfairly harm employees uninvolved in alleged wrongdoing, innocent investors, and entire sectors of the economy. Because of the highly regulated nature of the modern economy, the business community is concerned that, unless reasonable standards are adopted concerning the conditions that must be met before an indictment can be sought based on alleged violations of a nonprosecution agreement, premature and perhaps unwarranted indictment could bring down an entire company. The absence of such standards hurts businesses and their employees in all sectors, in part because they increase risk and deter capital investment.

NELF has regularly appeared in state and federal courts, as party or counsel, in cases raising issues of general economic significance to the New England and national business communities. *See, e.g., Rapanos v. United States*, 126 S. Ct. 2208 (2006); *S.D. Warren Co. v. Maine Bd. of Envtl. Protection*, 126 S. Ct. 1843 (2006); *Kelo v. City of New London*, 125 S. Ct. 2655 (2005); *San Remo Hotel, L.P. v. City of San Francisco*, 545 U.S. 323 (2005); *Exxon Mobil Corp. v. Saudi Basic Indus. Corp.*, 544 U.S. 280 (2005); *Commissioner v. Banks*, 125 S. Ct. 826 (2005); *Green Tree Fin. Corp. v. Bazzle*, 539 U.S. 444 (2003); *EEOC v. Waffle House, Inc.*, 534 U.S. 279 (2002); *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001); *Crosby v. National Foreign Trade Council*, 530 U.S. 363

(2000).

Of particular concern to NELF and its members in this case is that Stolt-Nielsen was first induced to disclose confidential information because of a signed nonprosecution agreement. Then, afterwards, based in part on the disclosed information, prosecutors sought to indict Stolt-Nielsen without first obtaining a determination that it had breached the agreement. Given the serious effects that the mere fact of an indictment can have on a business entity,[2] if the decision below stands, businesses may now be less willing to cooperate with the government in regulatory investigations than before, to the detriment of both the business community and society as a whole.

Amicus Curiæ therefore believes that this brief provides an additional perspective, which may aid the Court in determining whether to grant the petition for a writ of *certiorari* of the petitioners, Stolt-Nielsen S.A. and Stolt-Nielsen Transportation Group, Ltd. (collectively, "Stolt-Nielsen") and Richard B. Wingfield. Pursuant to Supreme Court Rule 37.2 (b), counsel for *Amicus* has bound a motion for leave to file this Brief together with the Brief, as counsel for Respondent has not timely informed counsel for *Amicus* of Respondent's position on the filing of this Brief.

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2 Formally, any business entity granted the status of an artificial person under state or federal law—including corporations, limited liability companies, limited liability partnerships, and professional corporations, and banking national associations—may be prosecuted. Because the corporation is the most common form of business entity, references in this brief to "corporations" or "corporate" issues are intended as shorthand to include all such artificial persons.

STATEMENT OF THE CASE

Amicus adopts the Statement of the Case contained in the Brief of Petitioners.

SUMMARY OF ARGUMENT

This petition for *certiorari* deals with the steps necessary before the government can abrogate a nonprosecution agreement and indict a corporation. *Amicus* argues that, in light of Stolt-Nielsen's property interest in its nonprosecution agreement, the government cannot indict Stolt-Nielsen without first demonstrating that it violated the agreement. Strong public policy concerns militate against violating expectations and indicting a corporation for business crimes that are also covered by civil regulatory penalties after the corporation has disclosed privileged information pursuant to a nonprosecution agreement. Such indictments can rarely achieve public benefits that outweigh the adverse consequences for the company, its employees, its investors, its customers, and its sector of the economy, especially considering the minimal time cost of deferring indictment until a judicial determination whether the company violated the nonprosecution agreement.

ARGUMENT

I. Public policy concerns and the potentially serious adverse collateral effects on innocent stakeholders when a business is indicted warrant the minor inconvenience of requiring that the government first obtain a judicial determination that the corporation violated a nonprosecution agreement.

Amicus NELF supports the arguments made by Petitioners that Petitioners properly sought injunctive relief against the government's threatened indictment. Prosecutorial

discretion is not unlimited and may be abused. This Court has approved injunctions barring prosecutions that abuse that discretion in rare, but appropriate circumstances, such as to protect endangered property rights. *See Younger v. Harris*, 401 U.S. 37, 50 (1971); *Dombrowski v. Pfister*, 380 U.S. 479, 486–87 (1965) (permitting injunction against criminal prosecution); *Hynes v. Grimes Packing Co.*, 337 U.S. 86, 98–99 (1949) ("[A] civil action will lie in exceptional circumstances that make an injunction necessary to effectually protect property rights."). *See also American Library Assn. v. Barr*, 956 F.2d 1178, 1188 (D.C. Cir. 1992) (discussing effects of *Younger* and *Dombrowski*); Petition at 14, 23–25.

In this case, Stolt-Nielsen obtained protected property rights by entering into the nonprosecution agreement with the government. *United States Trust Co. v. New Jersey*, 431 U.S. 1, 19 n.16 (1977) ("Contract rights are a form of property and as such may be taken for a public purpose provided that just compensation is paid."); *Lynch v. United States*, 292 U.S. 571, 579 (1934) ("The Fifth Amendment commands that property be not taken without making just compensation. Valid contracts are property, whether the obligor be a private individual, a municipality, a State or the United States."). *See Cienega Gardens v. United States*, 331 F.3d 1319, 1329 (2003) ("[T]here is . . . ample precedent for acknowledging a property interest in contract rights under the Fifth Amendment."). The property interest at stake in Stolt-Nielsen's contractual right of freedom from prosecution (absent a violation of the agreement) protects the very the life of the company. *KPMG: Escaping Arthur Andersen's Fate*, J. Bus. Law Soc. (June 22, 2005), available at http://iblsjournal.typepad.com/illinois_business_law_soc/2005 06/kpmg_escaping_a.html ("The corporate world has already seen what an indictment of a major accounting firm can result

in and few are eager to repeat the results: lost jobs, investments, pensions, for individuals, and the destruction of a firm as clients fled in droves.").

Amicus submits that, because indictment alone can have devastating practical effects on a company, Stolt-Nielsen's property rights might be damaged irremediably by indictment without an initial determination that it had breached its nonprosecution agreement. Many commentators echo the refrain that indictment alone can severely harm or ruin a business. Michael G. Oxley, Address, *In the Wake of the Sarbanes-Oxley Act*, 31 Ohio No. U. L. Rev. 319, 322 (2005) ("I've never believed in a government-imposed death penalty through indictment of entire companies. I think that experience has proved that the approach [is] ultimately counterproductive."); Christopher A. Wray & Robert K. Hur, *Corporate Criminal Prosecution in a Post-Enron World: The Thompson Memo in Theory and Practice*, 43 Am. Crim. L. Rev. 1095, 1097 (2006) ("[I]ndictment often amounts to a virtual death sentence for business entities . . . ."); *Government Takes Measures to Stop Companies from Paying the Legal Fees of Indicted Employees*, J. Bus. Law Soc. (April 18, 2006), available at http://iblsjournal.typepad.com/illinois_business_law_soc/2006/04/government_take.html ("According to Professor Ellen Podgor at Stetson University College of Law, 'if companies don't cooperate with the government, they can face a death penalty by being indicted.'"). *See* Petition at 11, 19.

The harmful effects from simple indictment can cause a downward spiral for businesses regardless of the ultimate result of the prosecution. These adverse effects of indictment include loss of confidence by customers, inability to attract potential investors, difficulty attracting high quality new employees, derivative issues raised by state regulators, filing of

private civil litigation, potential automatic debarment or exclusion from government programs, de-certification or downgrading by private listing and rating organizations, and devotion of significant corporate resources to fighting the charges. *See* Wray & Hur, 43 Am. Crim. L. Rev. at 1135 ("And in almost every instance, the prospect of costly follow-on civil litigation, both private (shareholder derivative suits, for example) and public (actions by increasingly aggressive state attorneys general) must be reckoned with as well."). The downfall of the company, in turn, results in adverse collateral consequences for completely innocent individuals associated with it.[3] Employees (the vast majority of whom are usually unaware of wrongdoing by a few) may lose their livelihoods

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3 The government recognizes the serious adverse effects of corporate prosecutions on innocent stakeholders, which it terms "collateral consequences." *See* Memorandum from Larry D. Thompson, Deputy Attorney General, to Heads of Department Components and United States Attorneys (Jan. 20, 2003), at § II, available at http://www.usdoj.gov/dag/cftf/corporate_guidelines.htm (commonly known as the "Thompson Memo") ("[C]ollateral consequences[] includ[e] disproportionate harm to shareholders, pension holders and employees not proven personally culpable and impact on the public arising from the prosecution."). *Id.* at § IX ("In the corporate context, prosecutors may take into account the possibly substantial consequences to a corporation's officers, directors, employees, and shareholders, many of whom may, depending on the size and nature (e.g., publicly vs. closely held) of the corporation and their role in its operations, have played no role in the criminal conduct, have been completely unaware of it, or have been wholly unable to prevent it. Prosecutors should also be aware of non-penal sanctions that may accompany a criminal charge, such as potential suspension or debarment from eligibility for government contracts or federal funded programs such as health care.").

and their pensions, while shareholders and bondholders (who have little control over day-to-day corporate affairs) may lose the value of their investments. *See KPMG: Escaping Arthur Andersen's Fate.* The failure of a significant business and the ripple effect on its stakeholders in turn can adversely affect an entire region or sector of the economy. *KPMG: Escaping Arthur Andersen's Fate* ("The implications of indicting a major . . . firm are clear: 'practical, economic, and social fallout' a former Justice Department official comments."). These concerns are relevant to every possible business-related crime, not just those in the antitrust field, but also in the areas of securities law, environmental law, tax, election law, and government contracts. Wray & Hur, 43 Am. Crim. L. Rev. at 1107. *See* Petition at 11. The issues raised in this case are, therefore, of significant concern to the entire business community.

The *Arthur Andersen* case, for example, arose in the securities field and clearly illustrates the harsh collateral effects of a criminal indictment of an entire business entity. *See Arthur Andersen LLP v. United States,* 544 U.S. 696 (2005). *See also* George Ellard, *Making the Silent Speak and the Informed Wary,* 42 Am. Crim. L. Rev. 985, 987–88 (2005) ("[A]s the demise of the accounting firm Arthur Andersen demonstrates, indictments can be lethal, even for venerable institutions. The 2002 indictment of that company and its subsequent conviction for obstruction of justice caused the 90-year old entity to implode."); Wray & Hur, 43 Am. Crim. L. Rev. at 1097 ("Th[e] conviction [of accounting firm Arthur Anderson] also effectively put the eighty-nine-year-old firm out of business and forced tens of thousands of people to find new jobs."); Andrew Ross Sorkin, *Quattrone May Avoid 3rd Trial,* New York Times (Aug. 19, 2006), at B1, 8 ("For many businesses, an indictment is an effective death knell, as it was for accounting

firm Arthur Andersen in 2002."); *KPMG: Escaping Arthur Andersen's Fate*, ("Andersen showed that an in[dict]ment of a corporation is practically a death sentence."). Although Arthur Andersen LLP was ultimately tried and convicted, in a decision eventually reversed by this Court because of improper jury instructions, *Arthur Andersen*, 544 U.S. 696, the company was ruined by the indictment long before the trial. Joseph A. Grundfest, *Over before It Started*, New York Times (Jun 14, 2005) ("Andersen was destroyed when it was indicted.... Andersen's demise did serve as a stern reminder to corporate America that prosecutors can bring down or cripple many of America's leading corporations simply by indicting them on sufficiently serious charges. No trial is necessary."). The total number of Arthur Andersen employees plummeted from 26,000 employees at the time of indictment to 10,000 by the time of the trial. David Roeder, *Andersen Gets Death Sentence*, Chicago Sun-Times (June 16, 2002). By time of this Court's decision in 2005, the company was liquidating its assets and counted only 200 employees, mostly processing legal claims. Greg Farrell, *Ruling on Anderson is too late*, Detroit Business News (June 5, 2005).

The serious adverse direct and collateral outcomes from business indictments provide powerful incentives to businesses to cooperate in criminal investigations in order to obtain protection from prosecution. Ellard, 42 Am. Crim. L. Rev. at 988 ("[T]he possibility of avoiding indictment creates a strong incentive for business organizations to cooperate in government investigations."); Wray & Hur, 43 Am. Crim. L. Rev. at 1104 (Nonprosecution "agreements ... allow the company to avoid any potential collateral consequences associated with the mere fact that the company has been charged with a crime...."); *id.* at 1138 ("[T]he collateral effects

of a corporate indictment might be disastrous . . . ."). While acceding to a nonprosecution agreement might entail some collateral harm to the company, an indictment would cause far greater injury.[4] These powerful incentives to settlement induced Stolt-Nielsen to sign the nonprosecution agreement and submit incriminating evidence to the government, which prosecutors now wish to use against Stolt-Nielsen. *See* Petition Appendix F (trial court opinion) at 48a–49a. In light of the evidence already turned over by Stolt-Nielsen in good faith, the consequences to it of the government's breaching its nonprosecution agreement and going forward with indictment would be especially devastating. This is particularly so when the trial court found that Stolt-Nielsen did not violate the agreement. *See* Petition Appendix F at 35a, 48a–49a.[5] In other

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4 *See* Wray & Hur, 43 Am. Crim. L. Rev. at 1104 ("Alternative resolutions [nonprosecution agreements and the potentially more serious deferred prosecution agreements], which are less punitive and entail reduced collateral harm, give prosecutors far more flexibility to strike the proper balance between punishing and deterring criminal conduct on the one hand and encouraging and rewarding voluntary disclosures and cooperation on the other."); *id.* at 1138 ("Although criminal prosecution of companies is relatively rare, the consequences for the unlucky few are so catastrophic that many companies under investigation have elected to maximize their chances of survival by providing prompt and authentic cooperation. They seek to ensure that the worst outcome that could befall them is a deferred prosecution, not indictment.").

5 In fact, Stolt-Nielsen received somewhat harsher treatment than the previous participants in Antitrust Amnesty Agreements, as those companies generally received a declination to prosecute altogether, rather than a nonprosecution agreement, which conditions the government's forbearance on the company's performance under the agreement. Wray & Hur, 43 Am. Crim. L. Rev. at 1155.

words, the government's proposed indictment of Stolt-Nielsen based on the alleged breach of the agreement was found to be factually unsupported.

In addition to the acknowledged adverse collateral effects of an unwarranted indictment, in this case Stolt-Nielsen would suffer the specific harms of unintended self-incrimination. The Seventh Circuit Court of Appeals precedents relied upon by Stolt-Nielsen, which require pre-indictment determinations in cases of alleged breach of a nonprosecution agreement, arose in the context of individual prosecutions. *See United States v. Meyer*, 157 F.3d 1067, 1076 (7th Cir. 1998) ("Absent exigent circumstances, an individual is entitled to a judicial determination of his breach before being deprived of his interest in the enforcement of an immunity agreement."); *United States v. Verrusio*, 803 F.2d 885, 889 (7th Cir. 1986) (pre-indictment determinations are "better procedure"). *See also* Petition at 13–16. In the business context, such as in this case, an indictment can have far more serious adverse collateral consequences on innocent stakeholders than would be the case in the prosecution of an individual. Therefore, substantive judicial review of alleged breaches of a nonprosecution agreement by a business before the government can proceed to indictment is even more vital than in the prosecution of an individual.

The position of the Court of Appeals for the Third Circuit below ignores not only the adverse collateral consequences of an indictment before a judicial determination whether a violation of a nonprosecution agreement occurred, it also contradicts sound public policy by encouraging overzealous prosecutions for little public benefit. The cost to the public would be minimal if this Court were to require a pre-indictment determination whether a potential criminal

defendant breached a nonprosecution agreement. *Meyer*, 157 F.3d at 1077 ("Since the government is required to obtain a judicial determination of a defendant's breach prior to trial, it is but a *de minimis* inconvenience for the government to secure that determination pre-indictment."). The adverse public policy consequences are significant. Not only can there be the serious adverse collateral consequences to innocent stakeholders discussed above, but the perception in the business community of unjust and overzealous prosecutors eager to overturn bargained-for nonprosecution agreements would actually deter cooperation with government investigations. *See* Wray & Hur, 43 Am. Crim. L. Rev. at 1144;[6] *id.* at 1171.[7] Courts have long

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6 If companies perceive the government as overly aggressive or unpredictable in its corporate charging decisions, and if prosecutors fail to give appropriate weight to the fact that companies self-report their misconduct, then companies may decide that the risk is simply not worth taking. In other words, if the government comes down too harshly on companies that self-report, word will spread throughout the business community and companies may stop self-reporting altogether.

Id. at 1144 (footnote omitted).

7 If companies perceive the government as overly aggressive or unpredictable in its corporate charging decisions, and if prosecutors fail to give appropriate weight to companies' self-reporting of misconduct, then companies may decide that the risk is simply not worth taking. If industry comes to view the possibility of a criminal conviction as only marginally less attractive than the certainty of harsh treatment at the hands of the government after self-

permitted limited review of prosecutorial discretion when constitutionally protected rights are at stake, such as Stolt-Nielsen's contractually based property rights in this case. Given the serious adverse collateral and public policy consequences of unjustified corporate indictments, absent exceptional circumstances not present in this case, these potential abuses of prosecutorial discretion warrant pre-indictment judicial review of alleged violations of corporate nonprosecution agreements.

> reporting its misconduct, then fewer and fewer companies will be willing to step forward, voluntarily disclose violations and cooperate with ensuing government investigations. Cooperation is only attractive, if it unmistakably helps, and helps a great deal.

Id. at 1171.

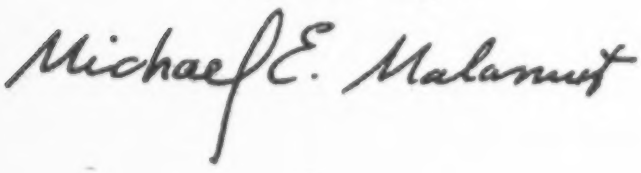
CONCLUSION

For the reasons stated above, this Court should grant the petition of Petitioners Stolt-Nielsen *et al.* for a writ of *certiorari*.

Respectfully submitted,

NEW ENGLAND LEGAL FOUNDATION,

By its attorneys,



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5 Sep 5 2006

NO. 06-97

IN THE
Supreme Court of the United States

STOLT-NIELSEN S.A.,
STOLT-NIELSEN TRANSPORTATION GROUP LTD.,
AND RICHARD B. WINGFIELD,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals
for the Third Circuit

BRIEF OF THE NEW YORK COUNCIL OF DEFENSE LAWYERS AS AMICUS CURIAE IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

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SEPTEMBER 5, 2006

QUESTION PRESENTED

Do the federal courts lack authority, under the Separation of Powers, to enjoin federal prosecutors from breaching a binding contractual obligation "not to bring any criminal prosecution" against a company and its executives?

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The New York Council of Defense Lawyers ("NYCDL") respectfully submits this brief *amicus curiae* in support of petitioner Stolt-Nielsen S.A. Letters from petitioner and respondent indicating consent to file have been filed with the Clerk. [1]

INTEREST OF AMICUS CURIAE

The New York Council of Defense Lawyers is a not-for-profit professional association of approximately 200 lawyers (many of whom are former federal prosecutors) whose principal area of practice is criminal defense in the federal courts of New York. The NYCDL's mission is to support and advance the criminal defense function by enhancing the quality of defense representation, taking positions on important defense issues, fostering understanding and consensus in areas of mutual concern to defense lawyers and prosecutors, and promoting collegiality among lawyers on both sides and the bench. In this brief supporting the petition for certiorari, the NYCDL seeks to offer the Court the perspective of practitioners who regularly handle some of the most complex and significant criminal cases in the federal courts.

As lawyers who regularly must counsel their clients with respect to nonprosecution agreements and other arrangements in which the government agrees not to take certain action in exchange for information, NYCDL's members have a direct and immediate interest in the question presented. Avoiding indictment is frequently the principal motivation for entering into these arrangements, and the decision below casts considerable doubt on the value of entering into such agreements if they cannot be enforced

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[1] Pursuant to Rule 37.6, amicus states that no counsel for any petitioner or respondent authored this brief in whole or in part. No person or entity made a monetary contribution to the preparation or submission of this brief.

prior to indictment. The question presented is thus an important one that affects the functioning of the criminal justice system and the professional and ethical obligations of the criminal defense bar.

REASONS FOR GRANTING THE PETITION

In the decision for which review is sought, the Third Circuit held that federal courts are prohibited, by virtue of the constitutional Separation of Powers, from enjoining a prosecutor's imminent breach of a nonprosecution agreement with a putative criminal defendant. The holding, causing a Circuit split, raises important issues that impact both a critical component of our criminal justice system and defense counsels' ability to represent clients zealously pursuant to their ethical obligations under the law. Cooperation and nonprosecution agreements--in which putative defendants provide potentially incriminating information in exchange for certain prosecutorial promises that the information will not be used against them--are a cornerstone of the fair and efficient operation of the criminal justice system. In order to advise their clients as to whether to enter into such agreements, defense counsel need to know whether, and at what point, such agreements are enforceable. The Third Circuit's holding that the government's actions are only reviewable post-indictment deprives a putative defendant of one of the principal reasons for cooperating--to avoid indictment--and undermines confidence in the fair administration of justice. Accordingly, there is an essential and pressing need for guidance from this Court as to whether the government can be held to its part of these bargains.

THE DECISION BELOW RAISES AN IMPORTANT QUESTION OF FEDERAL LAW THAT SHOULD BE ADDRESSED BY THIS COURT.

A. The Agreement At Issue is Similar to Many Other Arrangements Routinely Negotiated by Prosecutors and Defense Counsel.

In the agreement that the petitioner entered into with the Antitrust Division of the Department of Justice, the government promised "not to bring any criminal prosecution" against the petitioner. Pet. App. 78a-79a. The agreement was executed in conjunction with the Antitrust Division's Amnesty Program, whereby in exchange for a company's early disclosure of incriminating information and promise of future cooperation, the government agrees to refrain from bringing a prosecution. The antitrust Amnesty Program is just one of a number of cooperation/ nonprosecution programs offered by the Department of Justice and other federal agencies. *See, e.g.*, HHS OIG Self Disclosure Protocol, 63 Fed. Reg. 58399 (October 30, 1998). Outside of formal agency programs, there are also a variety of situations in which an individual or company provides potentially incriminating information in exchange for what has heretofore been assumed to be an enforceable promise from the prosecutor. These arrangements are advantageous to the government, the putative defendants, and the public in that they can advance an investigation immeasurably with significantly fewer federal monies being spent.

Prosecutors make promises to forgo prosecution or grant informal witness immunity in all areas of criminal enforcement. *See, e.g., United States v. McFarlane*, 309 F.3d 510, 513 (8th Cir. 2002). For instance, if a target of an investigation can potentially benefit the government's case and the public interest by offering cooperation, government prosecutors may meet with the target in the initial stages of an investigation in what is known as a "proffer" session.

The purpose of a proffer session is to preview a potential witness's testimony and allow the prosecutor to assess that witness's credibility. To protect the target's interests, the government agrees under specific circumstances spelled out in the proffer agreement not to use the target's statements against him in a subsequent prosecution. Without the protection of such a promise, criminal targets would not agree to participate in proffers.

If the government determines that a witness is credible and his or her cooperation in prosecuting another target outweighs the need to punish the witness for their own conduct, the government will offer that witness an agreement under which the individual agrees to testify, providing incriminating information under oath, in exchange for the government's promise to obtain court-ordered use immunity pursuant to 18 U.S.C. §§ 6001-6005.

In other cases, similar to that of the petitioner, the government promises transactional immunity in exchange for on-going cooperation with a government investigation or prosecution. Under these agreements, referred to as nonprosecution agreements, the government agrees to forswear any prosecution of an individual or entity for crimes that may have arisen from certain facts.

Nonprosecution agreements and the other examples discussed above share a common purpose: they are all a means by which putative defendants, in exchange for providing incriminating information which might otherwise provide the prosecutor with a basis to bring an indictment, obtain a prosecutor's promise to exercise his or her discretion not to do so. And all provide significant and important benefits to both the government and putative defendants. The Department of Justice's policies recognize these agreements permit access to testimony or other information when "timely cooperation appears to be necessary to the public interest and other means of obtaining

the desired cooperation are unavailable or would not be effective." *U.S. Attorneys' Manual* § 9-27.600 (2002).

The individuals and corporations who agree to cooperate are seeking not only to avoid a trial and possible conviction, but also are motivated by a very real need to minimize the significant consequences of a criminal investigation or indictment. As a district court judge (and former prosecutor) aptly describes it: "The service of a single grand jury subpoena can ruin a person's livelihood and, on occasion, even jeopardize a person's life. A lengthy investigation is likely to change the target's life irrevocably, even if there is no indictment; an indictment almost certainly will change the target's life, even if there is no conviction." John Gleeson, *Supervising Criminal Investigations: The Proper Scope of the Supervisory Power of Federal Judges*, 5 J.L. & POL'Y 423, 425-26 (1997). If federal courts are precluded from taking action to enforce these agreements prior to indictment, as the Third Circuit held, the calculus of these arrangements changes considerably, because putative defendants have no assurance they will get what they bargained for.

B. If the Criminal Justice System Is to Function Smoothly and Fairly, Putative Defendants Need to Know Whether Such Agreements Can Be Meaningfully Enforced.

It is axiomatic that broad prosecutorial discretion is an "integral feature of the criminal justice system." *U.S. v. LaBonte*, 520 U.S. 751, 762 (1997). The court below, citing this Court's precedents, noted that the executive branch "has exclusive authority and absolute discretion to decide whether to prosecute a case." *Stolt-Nielsen, S.A. v. United States,* Pet. App. 12a (quoting *United States v. Nixon,* 418 U.S. 683, 693 (1974)). But inherent in that authority is the discretion to choose *not* to prosecute and, therefore, the ability to negotiate how that discretion shall be exercised. In

nonprosecution agreements such as the one at issue, defense counsel have long considered these agreements to be a self-imposed and enforceable limitation on the prosecutor's discretion, as long as the putative defendant also abides by the terms of the agreement.

In *Santobello v. New York*, 404 U.S. 257 (1971), this Court recognized that the "interests of justice" and "appropriate recognition of the duties of the prosecution in relation to promises made" gave the courts the authority both to order specific performance of a plea bargain or to permit a defendant to withdraw his guilty plea. 404 U.S. at 262-63. As the court noted, "when a plea rests in any significant degree on a promise or agreement of the prosecutor, so that it can be said to be part of the inducement or consideration, such promise must be fulfilled." *Id.* at 262. The courts have recognized that "[i]mplicit in [*Santobello*'s] holding is the fact that the government may bargain away its discretion." *United States v. Watson*, 988 F.2d 544, 552 (5th Cir. 1993); *see also United States v. Alegria*, 192 F.3d 179, 182 (1st Cir. 1999) ("As a general rule, nothing precludes a prosecutor from bargaining away something over which he has discretion in return for promises extracted from a criminal defendant."). *Santobello*'s "logic" that the federal courts have the authority to hold prosecutors to their agreements "has been extended to immunity agreements and to cooperation agreements." *See In re Extradition of Drayer*, 190 F.3d 410, 412 (6th Cir. 1999) (citations omitted).

The holding below that the principles underlying the separation of powers deprive the federal courts of jurisdiction to enforce a nonprosecution agreement prior to indictment substantially undermines the logic of the Court's decision in *Santobello* and the safeguards that flow from it. It means that the prosecution unilaterally decides if the putative defendant has lived up to its obligations under the agreement, even though that is fundamentally a legal question ideally suited for disposition by the courts. *See, e.g.*

United States v. Brown, 801 F.2d 352 (8th Cir. 1986) (holding that defendant's cooperation agreement did not preclude indictment if defendant had breached agreement, and remanding for evidentiary hearing); *United States v. Calabrese*, 645 F.2d 1379, 1390 (10th Cir.) ("The question of a defendant's breach [of a plea agreement] is not an issue to be finally determined unilaterally by the government."), *cert. denied*, 454 U.S. 831, 102 S.Ct. 127, 70 L.Ed.2d 108 (1981); *see also United States v. Minn. Mining & Mfg. Co.*, 551 F.2d 1106, 1112 (8th Cir. 1977) (holding that government breached its promise to "forego future criminal prosecution" in exchange for voluntary disclosure of criminal activity "by returning [an] indictment against defendants"); *United States v. Paiva*, 294 F. Supp. 742 (D.D.C. 1969) ("if, after having utilized its discretion to strike bargains with potential defendants, the Government seeks to avoid those arrangements by using the courts, its decision so to do will come under scrutiny").

The decision below has caused considerable uncertainty and consternation among corporate counsel and defense counsel such as *amici*, who are no longer certain as to the value or meaning of these agreements for their clients. *See, e.g.,* L. Stuart Ditzen, *Questions of Credibility After U.S. Reneges On Deal*, PHILA. INQUIRER B01 (March 7, 2005); Richard M. Cooper, *Nonprosecution Issues,* THE NATIONAL LAW JOURNAL, at 15 (Apr. 10, 2006); Pamela A. MacLean, *3d Cir. to Hear Hot Antitrust Issue, Judge Enjoined DOJ from Indicting Based on Breach of Immunity Deal*, May 16, 2005 NAT'L L. J. S1, col. 1; Sue Reisinger, *Promise Breakers,* CORPORATE COUNSEL at 21 (September 2006). Because these agreements nearly always require putative defendants to disclose potentially incriminating information, the uncertainty can pose acute professional and ethical concerns for defense counsel obliged to zealously represent their clients, if there is a possibility that the government may use that information to bring a criminal prosecution.

Like the plea bargains at issue in *Santobello,* nonprosecution and other types of cooperation agreements are "essential component[s] of the administration of justice" with many positive consequences that should be encouraged. 404 U.S. at 260. These arrangements are a means by which prosecutors can obtain the critical information that they need in conducting an investigation or securing a conviction, and they can provide an incentive to disclose potentially criminal conduct. But, also as in *Santobello*, "all of these considerations presuppose fairness in securing agreement between an accused and a prosecutor," *id.*, and they demand "appropriate recognition of the duties of the prosecution in relation to promises made." *Id.* at 262.

Over thirty years ago, the Fourth Circuit considered whether the entire executive branch was bound by a nonprosecution promise offered by a single government agent. *United States v. Carter*, 454 F.2d 426, 427-28 (4th Cir. 1972). The court dismissed potential "fear[s] that an United States Attorney may unreasonably bargain away the government's right and duty to prosecute" as sufficiently provided for in the administrative controls over nonprosecution agreements. *Id.* at 428. It also explained:

> There is more at stake than just the liberty of this defendant. At stake is the honor of the government, public confidence in the fair administration of justice, and the efficient administration of justice in a federal scheme of government. *Id.*

All of those factors are equally implicated by the decision below, which raises an important question of federal law meriting this Court's plenary consideration.

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted.

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No. 06-97

IN THE

Supreme Court of the United States

STOLT-NIELSEN S.A., *et al.*,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF OF WASHINGTON LEGAL FOUNDATION, NATIONAL ASSOCIATION OF MANUFACTURERS, AND NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Do the federal courts lack authority, under the Separation of Powers, to enjoin federal prosecutors from breaching a binding contractual obligation "not to bring any criminal prosecution" against a company and its executives?

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BRIEF OF WASHINGTON LEGAL FOUNDATION, NATIONAL ASSOCIATION OF MANUFACTURERS, AND NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

INTERESTS OF *AMICI CURIAE*

The Washington Legal Foundation (WLF) is a non-profit public interest law and policy center with supporters in all 50 states.[1] WLF devotes a substantial portion of its resources to defending free-enterprise, individual rights, and a limited and

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[1] Pursuant to Supreme Court Rule 37.6, amici states that no counsel for a party authored this brief in whole or in part; and that no person or entity, other than amici and their counsel, contributed monetarily to the preparation and submission of this brief.

accountable government. In particular, WLF has frequently appeared in this and other federal and state courts to address the proper scope of criminal prosecutions against members of the business community. *See, e.g., Arthur Andersen LLP v. United States,* 544 U.S. 696 (2005); *Blandford v. United States, cert. denied,* 540 U.S. 1177 (2004); *Riverdale Mills Corp. v. Pimpare,* 392 F.3d 55 (1st Cir. 2004).

The National Association of Manufacturers is the nation's largest industrial trade association, representing small and large manufacturers in every industrial sector and in all 50 states. The NAM's mission is to enhance the competitiveness of manufacturers by shaping a legislative and regulatory environment conducive to U.S. economic growth and to increased understanding among policymakers, the media, and the general public about the vital role of manufacturing to America's economic future and living standards.

The National Association of Criminal Defense Lawyers (NACDL) is a non-profit organization with direct national membership of over 13,000 attorneys, in addition to more than 28,000 affiliate members from every state. Founded in 1958, NACDL is the only professional bar association that represents public and private criminal defense lawyers at the national level. NACDL's mission is to ensure justice and due process for the accused; a critical component of that mission is to promote the proper balance among the three branches of government in order to protect the adversarial system of justice.

Amici are concerned that if the decision below is allowed to stand, the business community and the public at large will lose the many benefits derived in recent years from the U.S. Department of Justice's Corporate Leniency Policy. That policy – by encouraging companies voluntarily to report

illegal antitrust activity – has facilitated government antitrust enforcement and thereby strengthened free-market competition. The decision below prohibits the federal courts from enforcing government promises – made in connection with the Corporate Leniency Policy – not to indict cooperating businesses. *Amici* are concerned that even if companies and individual defendants are later able to invoke such promises to win dismissal of an indictment, the prohibition against pre-indictment enforcement of such promises will significantly undercut their willingness to come forward with evidence of illegal antitrust activity.

WLF and NAM have no direct financial interest in the outcome of this case, and none of the Petitioners are members of NAM. *Amici* are filing due solely to their interest in ensuring that companies and individuals entering into negotiations with prosecutors can do so with the assurance that promises made by prosecutors are enforceable. *Amici* are filing this brief with the consent of all parties. The written consents have been lodged with the Clerk of the Court.

STATEMENT OF THE CASE

This petition raises an important constitutional question regarding the power of federal courts to enjoin federal prosecutors from bringing a criminal indictment. The court below held that federal courts (except under very limited circumstances not applicable here) lack such power. Other federal appeals courts have disagreed, holding that federal courts possess such power whenever (as Petitioners allege is true here) the plaintiff lacks an adequate remedy at law and will suffer irreparable harm unless an injunction is issued.

In late 2002, an attorney for Petitioner Stolt-Nielsen S.A. contacted attorneys with the U.S. Department of Justice's

Antitrust Division regarding possible violations of federal antitrust law. Pet. App. 5a. Stolt-Nielsen's attorney inquired regarding amnesty from antitrust prosecution against Stolt-Nielsen in return for information regarding illegal collusive trading practices among firms providing parcel tanker shipping services. *Id.* The federal government has in place a Corporate Leniency Policy, which accords leniency to corporations that voluntarily report their illegal antitrust activity. *Id.* 72a-75a. Pursuant to that policy, the federal government generally will not bring criminal charges against a firm that comes forward voluntarily, if certain conditions are met – including that the government has not previously received information about the illegal activity from another source, the firm cooperates completely with the government investigation, and restitution is made to injured parties. *Id.*

Stolt-Nielsen's discussions with the Antitrust Division ultimately resulted in the parties entering into a Conditional Leniency Agreement on January 15, 2003. *Id.* 65a-71a. Pursuant to that Agreement, Stolt-Nielsen turned over information to the government that led to criminal convictions of several firms and individuals for violations of the antitrust laws. *Id.* 7a. The federal government later terminated the Agreement and threatened to indict Stolt-Nielsen and several of its executives, claiming that Stolt-Nielsen had failed to fulfill its obligations under the Agreement by failing to inform the government that antitrust violations continued after March 2002. *Id.* 8a.

Stolt-Nielsen and one of its executives thereafter filed suit against the United States in U.S. District Court for the Eastern District of Pennsylvania, seeking an injunction against their indictment. In January 2005, the district court granted an injunction. *Id.* 34a-50a. The court initially determined that pre-indictment review was appropriate "because if an

indictment were later determined to have been wrongfully secured, it would be too late to prevent the irreparable consequences." *Id.* 45a. The court went on to conclude that an injunction was warranted because the government received the benefit of its bargain and thus was contractually obligated to abide by its promise not to prosecute Stolt-Nielsen and its executives. *Id.* 47a-50a.

The Third Circuit reversed. *Id.* 1a-21a. It held that federal courts have the power to hear pre-indictment challenges to threatened prosecutions only "where the mere threat of prosecution would inhibit the exercise of First Amendment freedoms." *Id.* 13a.[2] The appeals court held that in all other situations, a criminal defendant's ability to move to dismiss the indictment constitutes an adequate remedy at law, thereby precluding resort to the federal courts' equitable powers. *Id.* 19a-20a. The court said that any such injunction would violate Separation-of-Powers principles. *Id.* In light of its jurisdictional holding, the court declined to consider whether the government breached its agreement not to indict Stolt-Nielsen. *Id.* 21a n.7.

On July 20, 2006, Stolt-Nielsen, an affiliated corporation, and one of its executives filed this petition. On September 8, 2006, the United States obtained a criminal indictment against Stolt-Nielsen, two affiliated corporations, and two corporate executives. *United States v. Stolt-Nielsen S.A.*, Crim. No. 06-466 (E.D. Pa.). The indictment alleges that the defendants

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[2] In connection with its denial of a petition for rehearing, the Third Circuit panel amended its opinion to indicate that while there is a "general rule" against pre-indictment review, there is an exception to the general rule "in order to avoid a chilling effect on constitutional rights" – not simply, as the original opinion stated, to avoid a chilling effect on First Amendment rights. *Id.* 22a-25a.

engaged in a conspiracy in unreasonable restraint of trade in violation of Section 1 of the Sherman Antitrust Act, 15 U.S.C. § 1. The factual allegations contained in the indictment are derived from the information provided to the government by Stolt-Nielsen and its executives.

REASONS FOR GRANTING THE PETITION

This case presents an issue of exceptional importance to the entire business community, as well as all individuals facing criminal charges. The Third Circuit has held that even when federal prosecutors promise in writing not to indict a firm and its employees that cooperate in ongoing investigations of antitrust violations, federal courts lack jurisdiction to consider pre-indictment efforts to enforce that promise. Businesses often agree to cooperate with such investigations precisely because they have been promised that they will not be indicted. If businesses discover that they lack legal recourse to ensure that they receive the benefit of their bargains, they will be far less likely to report antitrust violations – thereby hindering enforcement and lessening free-market competition.

Petitioners have ably demonstrated that the federal appeals courts are sharply divided on that question, thereby warranting the Court's review. *Amici* write separately to focus on the Third Circuit's fundamental misunderstanding of this Court's case law regarding pre-indictment injunctions.

As this Court recently explained, comity considerations are the principal basis upon which federal courts may decline to exercise jurisdiction over challenges to criminal prosecutions. *Hamdan v. Rumsfeld,* 126 S. Ct. 2749, 2769-72 (2006). Thus, "the notion of 'comity,' that is, a proper respect for state functions," requires federal courts in most instances to abstain from hearing challenges to state-court criminal

prosecutions, even when the prosecution is based on a statute that is unconstitutional "on its face." *Younger v. Harris*, 401 U.S. 37, 44, 54 (1971). Similarly, considerations of comity to the military court system dictate that federal courts should generally abstain from hearing challenges to on-going court-martial proceedings. *Schlesinger v. Councilman,* 420 U.S. 738, 740, 758 (1975). But in the absence of such comity considerations, there is no reason to "permit federal courts to depart from their general 'duty to exercise the jurisdiction that is conferred on them by Congress.'" *Hamdan*, 126 S. Ct. at 2772 (quoting *Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706, 716 (1996)). Any such comity considerations are minimal when a federal court is asked to enjoin federal prosecutors from bringing an indictment in *federal* court.

The issue is not at all one of jurisdiction, which (contrary to the Third Circuit's decision) the federal courts so clearly possess in this case. Rather, the issue is whether Stolt-Nielsen has met the traditional prerequisites for obtaining equitable relief: a showing that it lacks an adequate remedy at law and will suffer irreparable injury if denied relief. The January 15, 2003 Conditional Leniency Agreement provided that if Stolt-Nielsen complied with its obligations under the Agreement, the federal government "agree[d] not to bring any criminal prosecution against" Stolt-Nielsen, its affiliates, and its current and former directors, officers, and employees. Pet. App. 68a-69a. Stolt-Nielsen alleges that it met its obligations under the Agreement, an allegation the Third Circuit did not dispute. Review is warranted to determine whether a post-indictment motion to dismiss is really an "adequate remedy at law" for the government's alleged breach of its promise "not to bring any criminal prosecution" – particularly in light of Stolt-Nielsen's evidence regarding the substantial collateral consequences of an indictment.

The federal government's September 8, 2006 indictment of Stolt-Nielsen, two affiliated corporations, and two corporate executives in no way lessens the importance of this Court's review of the Third Circuit's decision. A decision on any motion to dismiss the indictment will not answer the fundamental issue raised by the petition: whether parties may seek pre-indictment enforcement of a government promise not to bring an indictment. That issue, which has divided the federal appeals courts, is of utmost importance to companies contemplating coming forward with evidence of wrongdoing under the Corporate Leniency Policy. In light of that importance, review is warranted.

Moreover, review by this Court continues to be of great importance to Petitioners themselves. Under normal operation of criminal procedure rules, Petitioners cannot expect any motion to dismiss the indictment to be heard before the fall of 2007. In contrast, should this Court grant review, Petitioners are likely to have a decision more quickly – no later than the end of the Court's Term in June 2007. Given the significant negative consequences of a pending indictment on Stolt-Nielsen's business activities, anything Stolt-Nielsen can do to accelerate the judicial review process is of tremendous benefit to it.

Finally, Stolt-Nielsen has a significant interest in ensuring that no other current or former executives, officers, or directors are indicted. Unless the petition is granted, Stolt-Nielsen will have no means of ensuring that its interest in preventing such indictments is vindicated.

I. REVIEW IS WARRANTED TO DETERMINE WHETHER THE THIRD CIRCUIT, IN CONFLICT WITH OTHER CIRCUITS, HAS MISCONSTRUED THE RATIONALE UNDERLYING APPROPRIATE EXERCISE OF FEDERAL COURT EQUITABLE JURISDICTION

Neither the Third Circuit nor the Department of Justice disputes that Petitioners' complaint falls within the federal courts' federal question jurisdiction. Accordingly, their assertions that the federal court's lack "jurisdiction" to hear this dispute can only be based on an assertion that suits to enjoin federal criminal indictments are among the class of cases in which abstention is warranted. As we demonstrate *infra*, that assertion finds no support among the abstention cases upon which they rely. Review is warranted to determine whether the Third Circuit's expansion of abstention doctrine, an expansion that conflicts with other federal appeals court decisions,[3] is consistent with the federal courts' "general duty to exercise the jurisdiction that is conferred on them by Congress." *Hamdan*, 126 S. Ct. at 2772 (internal quotation omitted).

This Court has explained that federal courts should abstain from exercising jurisdiction over challenges to criminal prosecutions when doing so is necessary to promote comity – that is, harmony and mutual respect – among parallel criminal justice systems. Thus, for reasons of comity, federal courts generally abstain from exercising jurisdiction over challenges to state-court criminal prosecutions brought in good faith, even when the prosecution is based on a statute that is unconstitutional "on its face." *Younger v. Harris*, 401 U.S. at

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[3] *See, e.g., United States v. Meyer*, 157 F.3d 1067 (7th Cir. 1998).

54.[4] Rather, state courts are deemed adequate to consider such constitutional claims; and defendants unhappy with the state courts' determinations may seek review of those decisions in this Court.

Similarly, the Court has explained that comity considerations generally require federal courts to abstain from hearing challenges to on-going court-martial proceedings, even when the petitioner contends that the military court system lacks jurisdiction over the charges filed against him. *Councilman*, 420 U.S. at 758. That is so even though, at the time that *Councilman* was decided in 1975, defendants in military court proceedings lacked any right to seek appellate review of their convictions in a federal court.

But where comity or similar considerations are not at issue, the Court has explained that federal courts should not shun their duty to exercise the normal equitable jurisdiction conferred on them by Congress. *Hamdan*, 126 S. Ct. at 2772. Thus, the Court ruled in *Hamdan* that considerations of comity did not dictate that federal courts should abstain from hearing challenges to war crimes proceedings before a military commission, because the commission system was a recently created, *ad hoc* court system to which there was no need to defer in the interests of inter-court harmony. *Id.* at 2771.

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[4] The Court has created limited exceptions to that rule, as when a threatened state-court prosecution threatens to chill First Amendment rights, and – in light of potential repeat prosecutions – successful defense of one prosecution would not eliminate the chill. *Dombrowski v. Pfister*, 380 U.S. 479 (1965). Similarly, federal court intervention is appropriate to enjoin state-court criminal proceedings that threaten constitutionally protected property rights, where the plaintiff lacks an effective means of protecting those rights in the state proceedings. *Truax v. Raich*, 239 U.S. 33, 37 (1915).

Comity considerations similarly do not come into play when a federal court is asked to enjoin federal prosecutors from bringing an indictment in *federal* court. There is no danger of creating disharmony among competing criminal justice systems when the prospective criminal charge is to be filed in the same federal district court (in this case, the U.S. District Court for the Eastern District of Pennsylvania) as the action brought to enjoin the indictment.

In declining to exercise jurisdiction over Petitioners' claims, the Third Circuit suggested that its decision was dictated by Separation-of-Powers concerns. Pet. App. 12a. This Court has never so held. While the Executive Branch has absolute discretion regarding an initial decision to bring criminal charges (and thus the courts may not second-guess a decision not to bring charges), the Court has not suggested that there exist constitutional limitations on the federal courts' power to act once federal prosecutors have indicated their intent to move forward with criminal charges. For example, in *Hynes v. Grimes Packing Co.*, 337 U.S. 86 (1949), the Court upheld an injunction against federal criminal prosecution of fish canning companies for alleged violations of federal fishing regulations, without once suggesting that the injunction raised Separation-of-Powers concerns. Indeed, given the Department of Justice's concession that a federal district court is empowered to dismiss an indictment on the grounds that the government breached a promise not to bring an indictment, [5] there can be no plausible constitutional objection to permitting pre-indictment challenges. A pre-indictment injunction premised on enforcement of a promise not to prosecute is no

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[5] This Court held in *Santobello v. New York*, 404 U.S. 257, 262-63 (1971), that courts may enforce promises made to criminal suspects by prosecutors during the course of their negotiations, because "the interests of justice" so demand.

greater an intrusion on Executive Branch discretion than is post-indictment dismissal based on similar grounds.

The Court explained in *Hynes* that an action to enjoin a federal prosecution should be judged under the traditional prerequisites for obtaining equitable relief: a showing by the plaintiffs that "they are without an adequate remedy at law" and that they "will suffer irreparable injury" unless an injunction is issued. *Id.* at 98. Review is warranted to decide whether the Third Circuit erred in determining, contrary to *Hynes*, that the federal courts lacked jurisdiction to consider Petitioners' claims.

There can be little doubt that Petitioners lack an adequate remedy at law. The January 15, 2003 Conditional Leniency Agreement provided that if Stolt-Nielsen complied with its obligations under the Agreement, the federal government "agree[d] not to bring any criminal prosecution against" Stolt-Nielsen, its affiliates, and its current and former directors, officers, and employees. Pet. App. 68a-69a. Stolt-Nielsen alleges that it met its obligations under the Agreement, an allegation the Third Circuit did not dispute. There is no plausible interpretation of the Agreement other than that the Department of Justice promised not to indict Stolt-Nielsen under those circumstances. Accordingly, the opportunity to file a post-indictment motion to dismiss cannot be deemed "an adequate remedy of law" because it fails to provide Stolt-Nielsen with the benefit for which it bargained: immunity from indictment.

Moreover, Stolt-Nielsen has proffered substantial evidence that prohibiting a pre-indictment challenge will cause it irreparable harm. In particular, contractual rights conferred on Stolt-Nielsen by the Agreement are property rights; the Fifth Amendment protects corporations and individuals from

deprivation of property without due process of law. Yet, the Department of Justice has deprived Stolt-Nielsen of its property with no process whatsoever; it has unilaterally declared that Stolt-Nielsen has forfeited its property right due to its alleged breach of the Agreement. In the absence of pre-indictment review of such decisions in the federal courts, criminal suspects have no means of protecting their property rights. Review is warranted to determine whether the loss of valuable property rights without due process of law constitutes irreparable harm. *See, e.g., Abney v. United States*, 431 U.S. 651, 660 (1977) (criminal defendant may collaterally appeal an adverse ruling on a defense of double jeopardy; relegating such a defendant to an appeal following conviction constitutes irreparable harm because it would irrevocably deprive him of the constitutional right not to be forced to stand trial a second time).

In the appeals court, the Justice Department relied heavily on the D.C. Circuit's decision in *Deaver v. Seymour*, 822 F.2d 66 (D.C. Cir. 1987), a challenge to the constitutionality of the federal independent counsel statute. In fact, *Deaver* is strongly supportive of Stolt-Nielsen's position. In denying a pre-indictment challenge to criminal charges, the court noted that the plaintiff did not assert that either an indictment or a trial would violate his constitutional rights; he was merely challenging the authority of a particular prosecutor to bring charges. *Id.* at 71. In denying him pre-indictment review, the court contrasted the plaintiffs' claims to those of individuals deemed entitled to seek relief, noting that in the latter set of cases the claimants "had alleged the violation of a specific right guaranteed by the Constitution, the legal and practical value of which would be destroyed" unless immediate judicial review were permitted. *Id.* at 70. Thus, *Deaver* supports the availability of injunctive relief for those, such as Petitioners, who assert that denial of injunctive relief

will result in irreparable harm because the practical value of their Fifth Amendment due process rights will be destroyed.

In sum, the actions of the Third Circuit – basing denial of relief on jurisdictional grounds and failing to base its decision on the traditional prerequisites for obtaining equitable relief – contrast sharply with the approach taken by this Court as well as other federal appeals courts. Review is warranted to resolve that conflict.

II. THE SEPTEMBER 8, 2006 INDICTMENT OF STOLT-NIELSEN DOES NOT LESSEN THE IMPORTANCE OF REVIEW BY THE COURT

Without awaiting the Court's disposition of this certiorari petition, the federal government on September 8, 2006, obtained a criminal indictment against Stolt-Nielsen, two affiliated corporations,[6] and two corporate executives.[7] *United States v. Stolt-Nielsen S.A.*, Crim. No. 06-466 (E.D. Pa.). The indictment alleges that the defendants engaged in a conspiracy in unreasonable restraint of trade in violation of Section 1 of the Sherman Antitrust Act, 15 U.S.C. § 1. The factual allegations contained in the indictment are derived from the information provided to the government by Stolt-Nielsen and its executives.

The indictment neither renders the petition moot nor lessens the importance of this Court's review of the Third Circuit's decision. Petitioners could, of course, file a motion

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[6] Stolt-Nielsen Transportation Group Ltd. (Liberia) and Stolt-Nielsen Transportation Group Ltd. (Bermuda).

[7] Samuel A. Cooperman, Chairman of Stolt-Nielsen; and Petitioner Richard B. Wingfield.

in the district court to dismiss the indictment. But a decision on any motion to dismiss the indictment will not answer the fundamental issue raised by the petition: whether parties may seek pre-indictment enforcement of a government promise not to bring an indictment. That issue, which has divided the federal appeals courts, is of utmost importance to companies contemplating coming forward with evidence of wrongdoing under the Corporate Leniency Policy, as well as to all individuals facing criminal charges. In light of that importance, review is warranted.

The Corporate Leniency Policy does, of course, make clear that leniency is contingent upon a corporation "report[ing] the wrongdoing with candor and completeness and provid[ing] full, continuing and complete cooperation to the [Antitrust] Division throughout the investigation." Pet. App. 72a. But nothing in the Policy, or in the Agreement entered into between Stolt-Nielsen and the Justice Department, provides any inkling that the Department of Justice is to be the sole judge of candor and completeness. By now taking the position that it is, indeed, the sole judge of those issues (at least until after the company has been deprived of its contractual right not to be prosecuted), the Department of Justice can fairly be accused of deceiving companies that entered into Amnesty Agreements in the good-faith belief that they would be entitled to a meaningful hearing on their contractual rights. Review is warranted to determine whether the United States government should be permitted to conduct its affairs in this manner. Moreover, amici respectfully submit that companies will be significantly less willing to come forward with evidence of illegal antitrust activity if they are deprived of the ability to enforce the cooperation agreements they enter into with prosecutors. If review is denied, those concerns will persist regardless whether Stolt-Nielsen wins a district court motion to dismiss the indictment.

Moreover, review by this Court continues to be of great importance to Petitioners themselves. Under normal operation of criminal procedure rules, Petitioners cannot expect any motion to dismiss the indictment to be heard before the fall of 2007. In contrast, should this Court grant review, Petitioners are likely to have a decision more quickly – no later than the end of the Court's Term in June 2007. The demise of Arthur Andersen LLP – despite its ultimate vindication in the criminal courts, *see Arthur Anderson LLP v. United States*, 544 U.S. 696 (2005) – well illustrates the crippling effect that pending criminal charges can have on a company's ability to continue as a going concern. Given the significant negative consequences of a pending indictment on Stolt-Nielsen's business activities, anything Stolt-Nielsen can do to accelerate the judicial review process is of tremendous benefit to it.

Finally, Stolt-Nielsen has a significant interest in ensuring that no other current or former executives, officers, or directors are indicted. The Amnesty Agreement provided that "subject to [Stolt-Nielsen's] full, continuing, and complete cooperation," the Antitrust Division agreed that such individuals would "not be prosecuted criminally" in connection with the anticompetitive activity being reported, provided that such individuals "admit their knowledge of, or participation in, and fully and truthfully cooperate with the Antitrust Division in its investigation of the anticompetitive conduct being investigated." Pet. App. 68a-69a. Unless the petition is granted, Stolt-Nielsen will have no means of ensuring that its interest in preventing such indictments is vindicated. To date, two Stolt-Nielsen executives – Richard Wingfield and Samuel Cooperman – have been indicted; thus, they are in a position to file motions to dismiss their indictments. But even a district court order dismissing all pending indictments would not eliminate the threat that other

corporate officials could be indicted. Review is warranted to permit Stolt-Nielsen an opportunity to remove that threat.

CONCLUSION

Amici curiae Washington Legal Foundation, the National Association of Manufacturers, and the National Association of Criminal Defense Lawyers respectfully request that the Court grant the petition for a writ of certiorari.

Respectfully submitted,

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